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THE
HIST

OF THE

LEGISLATIVE
CASE

OF

Controverted Elections,

WHICH WERE

TRIED AND DETERMINED

During the First and Second Sessions of the Fourteenth
Parliament of Great Britain, 15 & 16 GEO. III.

BY THE RIGHT HONOURABLE

SYLVESTER DOUGLAS,

LORD GLENBERVIE.

Mais si les tribunaux ne doivent pas être fixes, les jugemens doivent l'être
à un tel point, qu'ils ne soient jamais qu'un texte précis de la loi. S'ils étoient
une opinion particulière du juge, on vivroit dans la société sans sçavoir pré-
cisément les engagemens que l'on y contracte.—L'Esprit des Loix, liv. xi. c. 6.

Quod neque inflecti gratiâ, neque perfringi potentiâ, neque adulterari pecu-
niâ possit.—Cic.

LEGISLATIVE
IN FOUR VOLUMES.

VOL. I.

Second Edition, with Corrections and Additions.

LONDON:

Printed by Luke Hansard,

For E. & R. BROOKE and J. RIDER, Bell-Yard, Temple-Bar,
and JOHN STOCKDALE, Piccadilly.

1802.



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Luke Hanford, Printer,
Great Turnstile, Lincoln's-Inn Fields.

C O N T E N T S

OF VOL. I.

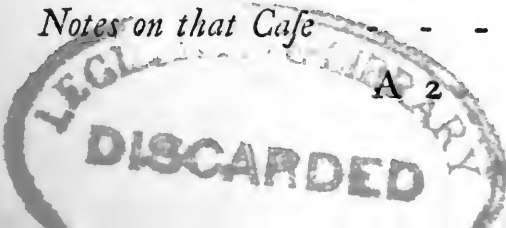
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P R E F A C E.

THE Publishers of the present edition of the following Work have undertaken it with my consent. As it has become scarce, they think a new supply of copies may be desirable, at the return of a period when questions of election law acquire a considerable degree of general interest and importance.

I regret that the shortness of the time since I was apprized of their intention, together with their wish to forward the publication as much as possible, would not permit me, without interfering with other and more necessary avocations, to make such corrections and additions to the notes as my experience and reading, in the course, first of my professional, and afterwards of my parliamentary

attention to many of the subjects discussed in them, might have suggested to me.

I have indeed been able to introduce a few improvements of that sort, and references have been made to decisions which have since been reported, on points determined or debated in the cases of which I have given an account.

But, with those exceptions, I thought it better to leave the part of the work for which I am more particularly accountable, with its first imperfections, than to engage in a revision to which I foresaw that I could not dedicate a sufficient portion of time.

I am particularly desirous to observe to the reader, that the *Introduction* remains exactly in the state in which it appeared so long ago as the year 1775; that subsequent reflection and observation, if I had possessed more leisure, would have induced me to review, and perhaps to qualify some passages in the *first* section; that I am conscious I may be thought, in the *second*, to have treated a question of nice consideration, namely, the binding authority

of judicial decisions, with somewhat too much of the confidence incident to legal disquisitions by unpractised lawyers, (though I must add here that I have seen no reason since to change the *opinion* I had then formed on that point); and that the *third* section would require in many parts to be new modelled, in consequence of the different acts which have since been passed relative to the formation of Committees, the course of proceedings before them, and the extent of their jurisdiction.

If I had myself undertaken a new edition, I should have wished also to accompany it with a discourse, I have long meditated, on certain questions of considerable difficulty, which are often agitated before election committees.

The chief of those questions belong to the following heads; 1. The degree and modes of *notice* necessary to render void the votes given in favour of disqualified persons: 2. The different kinds of *disqualification*, whether at common law, or by statute: 3. The nature and effects of *agency* in election matters: 4. *Those rules of evidence* whose application occurs most frequently before Election Committees,

mittees, with *the principles* from whence those rules are deduced, and *the authorities* on which they are founded : 5. The common and statute law respecting the offences of *bribery* and *treating*, and their penal consequences to the *electors*, and the *elected* : 6. *Occasionality* : 7. The consideration how far Committees of Election ought to hold *proceedings at law*, or *the neglect* to *institute*, or to *prosecute with due diligence*, such proceedings, to be binding and conclusive on them, when matters directly belonging to the jurisdiction of the courts of law arise incidentally before them : I refer here particularly to corporate rights, to the right of being inserted in the poor-rates, or land-tax assessments in England, and to that of being inscribed in the freeholders roll in Scotland.

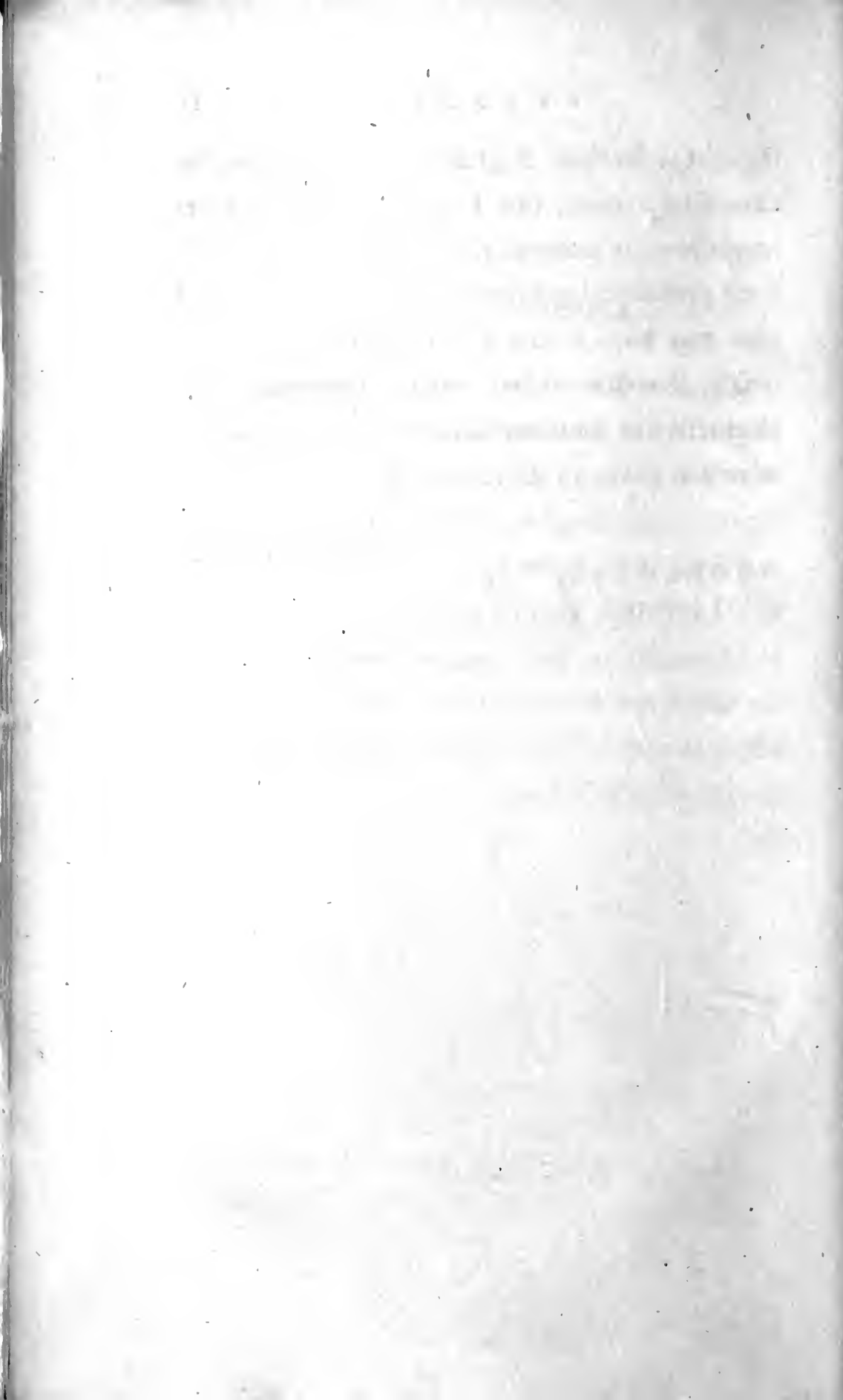
But, on the eve of a general election, such disquisitions would have been improper, as they would have tended to prejudge (as far as the sentiments of the author might have weight) what may soon become the subject of judicial investigation.

I have therefore at least postponed my plan in that respect ; and shall conclude what I have
thought

thought it necessary to prefix on this occasion, by expressing a hope, that I may be justified in relinquishing it altogether, by seeing it adopted by some professional gentleman more competent, and who may have leisure and inclination for a task which, if well executed, would, I apprehend, be productive of considerable advantage to the public, as well as credit to the author.

G L E N B E R V I E,

Pay Office, Whitehall,
26 June 1802.



ADVERTISEMENT.

ON occasion of the re-publication of this Work, it has been recommended as desirable to add the STATUTES which have passed for regulating the proceedings in Committees on Controverted Elections, subsequent to the original publication; and, the FINAL DETERMINATIONS of the House of Commons on the Statements delivered under the directions of the Act of 28 Geo. III. c. 52.;— which are, accordingly, subjoined to the Appendix in the Fourth Volume.

INTRODUCTION.

SECTION I.

Sect.
I.

*Of the Jurisdiction of the House of Commons, in the
Trial of Controverted Elections.*

THE particular constitution of the great legislative Council of this country, before the Norman invasion, continues to be a matter of much obscurity. After the laborious enquiries of learned men, and the more penetrating researches of zeal and party, we seem to be still only possessed of probable and conjectural evidence, that the Commons had then a share in the legislature. Of the mode in which they may have exercised their legislative powers, we are, I believe, altogether ignorant.

Whatever reason we may have to conclude, that the Saxon, and Danish invaders of this island, brought with them the rudiments of the feudal government, which were common to all the migrating tribes of the North, yet it is certain, that those rude warriors were unacquainted with the numerous refinements, which were, afterwards,

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I.

considered as of the very essence of that form of polity; such as the law of guardianship, marriage, reliefs, and primer seisin. These were the invention of subtle lawyers and politicians, and, as it were, the offspring of riper years; which is evident from this consideration, among many others, that they all depend upon the transmissible, hereditary nature of fiefs; a quality they did not acquire, till about a century before the Conquest (A).

[3]

It is probable, that some of the later Saxon monarchs introduced, in part, into England, the changes which had taken place on the continent; particularly Edward the Confessor; who, having received his education in Normandy, was strongly attached to the language, the manners, and the laws of that country. But it was William the Conqueror, and his immediate successors, who established the feudal system universally over their new dominions, with all its complicated and oppressive train of attendants, such as it already existed in their continental territories.

During the first reigns after the Conquest, the great Council seems to have been little more than a sort of royal *court-baron*,* consisting of the king's immediate tenants, in like manner as the suitors in the inferior courts-baron were the tenants of the lords. Yet, even at that period, the Commons appear to have given their sanction to those general constitutional acts, known under the names of,

* "*Commune concilium regni.* of the kingdom." Gilb. Forum. Rom. p. 3.

the

the Great Charters of Henry I. Henry II. and John. [Sect. I.]

From the end of the reign of Henry III. or rather from the middle of that of his son, we have authentic evidence of Parliaments constituted nearly as they are at present ; composed of three distinct branches, the King, Lords, and Commons ; and the third branch, from that æra, has always consisted of the representatives of the people, chosen by the freeholders (B) of the counties, and by different classes of men, in the different cities and boroughs of the kingdom.

[4]

The origin of that diversity which we observe in the right of voting for representatives, in different boroughs, is a subject of curious disquisition, but cannot be explained with any degree of certainty. It may be conjectured that, in some instances, the right was limited to a particular class of men, by the King's charter, under which, the borough derived its title to send members to Parliament ; for our Kings claimed, and exercised, the prerogative of conferring that important privilege, down to the end of the reign of Charles II. (C). In other instances, where the city or borough began to choose members from the first epoch of representation, without having received any royal charter to regulate who should elect, it is probable all those were admitted to vote, who were deemed capable of giving a free suffrage. Hence we find the right of election, in some places, confined to particular members of the corporation, and, in

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I.

others, common to the inhabitants at large. In some cases, perhaps, the sheriff, who long exercised a very great discretionary authority as to borough-elections (D), prescribed who the persons should be who were to concur in the choice.

Be this, however, as it may, for a long course of years, few questions arose concerning contested elections (E). There were seldom competitors for an office, which was rather a burthen imposed, than a distinction conferred (F). Some instances of this sort are to be met with in early times; but, when they did occur, there was no settled tribunal for their decision. They were determined sometimes in Westminster-hall, and sometimes by the Lords in Parliament (G). The Commons were not, in those days, jealous of the interference of the Crown, or the Peers. The history of England furnishes many other examples, where they appear to have neglected, or abandoned, privileges of the utmost importance. When Simon de Bereford, a commoner, was, at the special instance of the King, tried, and condemned by the Peers, for high treason, in the beginning of the reign of Edward III. the Lords themselves protested against the precedent; thinking it beneath their dignity, to be burthened with the trial of criminals, who were not of their own degree. But there is no account of any alarm taken by the Commons; no hint that they regarded this proceeding as an encroachment upon their order, or an infringement of their rights (H). Edward the first granted to
the

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the People (1), “ that, if they listid, they should
“ have the election of their sheriff, in every shire
“ where the shrievalty was not of fee.” But they
valued this franchise so little, that his son, at the
particular request of the people, resumed it, and
enacted (2), “ that sheriffs should thenceforward
“ be assigned by the chancellor, treasurer, barons
“ of the exchequer, and the justices.”—Nor can
this surprise us, when we consider that, during the
vigour of the feudal aristocracy, the People, find-
ing themselves incapable of self-protection, were
only ambitious of the patronage of some powerful
baron, and were, in a great measure, strangers to
that spirit of independence, which is now the cha-
racteristic of our constitution.

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In the succession of ages, a mighty change took
place in most of the feudal governments; particu-
larly in England. The exorbitant power of the
barons, which the King’s feeble and limited au-
thority was unable to controul, gave rise to num-
berless jealousies and civil wars; till a great part
of their ancient territories were either exhausted by
the efforts they made, or reciprocally confiscated,
by the parties which chanced, at different times,
to prevail. Many of the most considerable families
were entirely extinguished, either by the fortune of
war, or the sword of justice; and, when the con-
test between the two roses was finally terminated

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(1) 28 Edw. I. Stat. iii. cap. 8. an. 1300.

(2) 9 Edw. II. Stat. ii. An. 1315.

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I.

by the union of the houses of York and Lancaster, in the person of Henry VIII. the strength, riches, and domains of the old rivals of the kingly power, had, in a great measure, fallen into the hands of the crown. The over-grown possessions of the remaining nobility were gradually sapped, and diminished, by the operation of that policy, by which the judges, under the cover of a legal fiction, had, in effect, repealed the statute of entails; a statute extorted by the barons, from Edward I. with the vain design of perpetuating their grandeur with their estates. This policy had been connived at by Edward IV. and Henry VII. and soon received a parliamentary sanction. It was the original source of the independence and riches of the People; who were encouraged by the first princes of the house of Tudor, as an instrument to aid them in their project of annihilating the power of the nobles.

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In the mean time, learning and the arts were revived in the West; the two Indies were discovered; navigation was improved; commerce cultivated; and opulence universally and eagerly pursued. The People soon found themselves in a condition to acquire that landed property, which common recoveries (now become the law of the land) enabled the nobility to alien. Riches naturally beget the spirit of independence; but other more powerful causes co-operated to the same effect. Literature and philosophy had enlightened and enlarged the human faculties. The follies of superstition,

stitution, and the impositions of priestcraft, were detected, and attacked with success. The reformation of the church could not take place, without affecting the state. Civil liberty was as eagerly sought after, as freedom of conscience; and the Commons of England felt and asserted their importance. The representatives of the People no longer considered themselves as mere attorneys, or agents, paid by their constituents, for the sole purposes of bestowing their property, and of presenting their humble petitions for the redress of grievances. They assumed the character of statesmen, politicians, and law-givers; of trustees charged with the guardianship of the property, the liberty, and the lives of a great nation. A seat in their house was soon one of the prime objects of ambition. It was a prize for which many contended at once. Contested and litigated elections, therefore, became daily more and more frequent.—But a question now arose concerning the judicature, by which they should be tried and determined. (I.)

[10]

The Commons could no longer bear, that the upper House should decide on the right of sitting in theirs; and they were equally unwilling, that the judges of Westminster-hall should exercise this jurisdiction, being men, at that time, exposed to the influence of the Crown, and removable from their places, if they should be found not sufficiently subservient to its commands. The chancellor advanced a claim, founded on this technical reason, that the parliamentary writ issues out of chancery,

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I.

and is returnable there (K.) However, notwithstanding repeated attempts, towards the end of queen Elizabeth's reign, and the beginning of James the first's, to draw this power to the court of chancery, the Commons were able to maintain and establish the exclusive right of trying controverted elections; and they have enjoyed that right, without interruption, for near two centuries (K).

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In the beginning, their determinations were distinguished for their wisdom, purity, and justice. The first men, for talents, and integrity, were selected from the body of the House, and, under the name of a Committee of Privileges, formed a court less numerous than the whole House, and, on that account, as well as many others, better fitted for the attainment and dispatch of justice. It is impossible, on this occasion, not to mention a late publication, which contains the history of the proceedings of one of those early committees (1), written by the chairman who presided in it. Whoever peruses that little work, must regret that it was so long withheld from the press; for it is equally valuable, on account of the admirable decisions it contains, and the excellent method pursued by Glanville in reporting them.

This chastity of decision, however, was not very durable. The united strength of the Crown, and People, having subdued the aristocracy of the Peers, those two remaining branches of the state began,

(1) Appointed Feb. 23, 1623/4. Journ. vol. i. p. 671, col. 2.

each,

each, to aim at the exclusive possession of the sovereignty. This struggle between the Crown and the People, was not peculiar to England. It took place, nearly at the same time, in many other countries of Europe; particularly in France; where the nobles, after having been equally formidable, had been reduced, by very similar means, and in the same manner, as in England. But now the success was very different. In France, the King prevailed, and an absolute monarchy was established. In England, after several violent and convulsive efforts, the Commons fixed their independence, as it were, on a rock; yet still left the other two great members of the state, possessed of large, though limited powers, so as to blend the three together, with a harmony more perfect, than the most ingenious speculation could invent, or the most penetrating wisdom foresee.

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Yet, even this wonderful system, like all human things, was liable, and has been exposed to abuse. The Crown, entrusted with the executive power, found it impossible to carry on the business of government, without a majority of voices in the House of Commons. The rough attempts at prerogative had proved ineffectual. The more winning, and insidious arts of influence were now practised with better success. The majority and the minority in the House of Commons, became terms nearly synonymous to the friends or opponents of the minister; and, whenever the party in opposition gained so far in numbers as to form the majority,

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I.

jority, a subversion of the reigning ministry was the immediate consequence.

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It is evident that, in this state of things, it must often have been of consequence, to those in power, that, in litigated cases, one of the competitors should succeed, in preference to the other. Election causes were now frequently tried at the bar of the House, and, when they were referred to the Committee of Elections, the resolutions of that Committee were to be canvassed, and either rejected, or confirmed by the House (I). A majority there was able to determine any question. The opprobrium and guilt of partiality and injustice seemed to lose their severity, when divided among so great a number; and the cause was generally decided, not in favour of the person who had the merits for him, but of him who had secured the favour of the minister. —To make way for the final determination, when the right of election in a borough had been claimed by different classes of men, it was necessary for the House, first, to declare in which of the contending parties the right, by law, resided; and, there too, the most common rule was to decide, not according to the evidence of the *lex loci*, but in favour of those, who had given their voices to the ministerial candidate.

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This, in the course of a few years, produced a great number of illegal, inconsistent, and contradictory decisions. If a whig was a contending candidate, when the whigs were in power, the right of election was declared to be in his friends.

If, for the same borough, a new contest arose, under a tory administration, and the tory candidate had the suffrages of a class of men, who had been excluded on the former occasion, the right of voting was then bestowed upon them (1). In short, to bring in the favourite candidate, and strengthen the majority, by a new voice, every fence of law, justice, and even decency was broken down.

Several attempts were made, at different times, to apply a remedy to this scandalous and growing evil (L). Among others, a statute passed in the second year of the late King (2), which enacted, that the last determination in the House of Commons, should be, to all intents and purposes, final, as to the right of election. By this means, some check was put to the glaring inconsistency of opposite determinations. But it was a very inadequate cure. The same gross and avowed partiality continued in the trial of facts; in all cases where there was no last determination of the right of election; and in explaining ambiguous, or supposed ambiguous, expressions, in last determinations, where such were to be found.

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At the same time, there were other unavoidable defects in this judicature. It was too numerous for dispatch; the judges were not upon oath; and they had no power of administering an oath to the witnesses whom they examined. In short, in a country where justice is dispensed with a degree of

(1) See the case of Bewdley, cited *infra*, in the case of Helleston.

(2) 2 Geo. II. cap. 24.

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I.

wisdom, purity, and consistency, unparalleled in other ages or nations, there existed the most imperfect, partial, and inconsistent tribunal, which perhaps ever was known in any civilized government.

[17] All wise, and all good men lamented the continuance of such a national reproach; but, for a long time, nobody was found, who, with abilities to contrive, possessed spirit and weight sufficient to carry into execution, a plan for abolishing the old, and establishing a new judicature; not liable to the defects of the former, but analogous, both in its constitution and chastity, to the other courts of justice. At length, Mr. Grenville conceived, and accomplished this great work, though he did not live to enjoy the just applause, which has, on that account, been lavished on his memory. The first act establishing the present mode of trying controverted elections passed in 1770 (1), (M); and Mr. Grenville died on the 13th of November of the same year.

[18] At first, this act was only temporary and limited to seven years. But, four causes having been tried under it, the justice of the decisions (so different from former examples) rendered it almost the idol of the public; and in 1774, just before the last general election, a bill was brought into the House of Commons, and passed into a law, which made it perpetual (2).

(1) 10 Geo. III. cap. 16.

(2) 14 Geo. III. cap. 15.

SECTION II.

Sect.

II.

Of the Authority of Precedents in Cases of Controverted Elections.

IN the end of the year 1774, a dissolution of Parliament, and a general election took place; which was the first since the statute of the 10th of George III. had passed. In consequence of the contests which took place on that occasion, a number of petitions were presented to the House of Commons, in the beginning of last winter; and they came, of course, to be referred to Committees, chosen under that statute. It was then very generally thrown out in conversation, by gentlemen of consideration, both at the Bar, and in the House, that the decisions of those Committees would probably, in the progress of the session, fix and ascertain many important points of election law, which had continued, hitherto, in a fluctuating and uncertain state. Influenced by the opinion of many persons, on whose judgment he sets the highest value, the Author of the following Collection resolved to attend those Committees very regularly; and, finding himself possessed of sufficient leisure for that purpose, he determined to commit to writing, in as faithful and complete a manner as he could, the proceedings in all the different election

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tion

Sect.
II.

tion causes. This he hoped might be of use to himself, to his friends, and perhaps to the public. In the course of the session, however, this hope was often damped, by many hints which fell, on different occasions, from gentlemen, in their arguments at the bar, and were adopted by others in private, and much enlarged upon, tending to establish a doctrine, which would have rendered the labour of this intended compilation entirely nugatory and useless.

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This was no other, than that the proceedings and determinations of one Committee, cannot, and ought not to be of any authority, to bind any future Committee, in the trial of similar questions: in short, that they are not to be considered, in any respect, as precedents, in the nature of adjudged cases in the courts of law. This doctrine he was unwilling to adopt, not merely because it would have frustrated what was now become a favourite design, but, he believes, for much better reasons. He thought, that if it prevailed, it would entirely defeat what he looks upon to be, by far, the most important object of the new judicature, and indeed of all tribunals of every sort; in as much as the establishment of fixed and invariable rules of law, in which every individual of the commonwealth is interested, is of more serious consequence, than the mere decision of a particular dispute between individuals; the main end of all civil polity being, rather to prevent litigation, than to put an end to it when it has arisen. He was de-

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sirous,

sirous, however, to examine upon what foundation so inauspicious a system was built; and the result of his reflexions on the subject has been, that, to his understanding, it is ill supported by reason, and would be highly inconvenient, and impolitic in its consequences.

A Committee for trying controverted elections, differs in one respect from most other courts of justice in this kingdom: because the members of it unite in them the double capacity of judges and jurymen. They are to enquire into facts, as well as to determine the law. Now, as to that part of their proceedings, which may be compared to a verdict at common law, where they declare, upon their oaths, what the facts of the case are, I agree that such declaration can have no binding authority in other cases, or on other Committees. But neither does the verdict of one jury bind another. This is an obvious consequence of the nature of the thing. The facts are to be found from the evidence, which is, and must be various, in every different case. Besides, every fact is a specific, individual, distinct thing, different from every other fact. But the evidence of the law does not vary. It is, or ought to be, the same. A rule of law is a general, abstract, permanent maxim, equally applicable to innumerable individual cases; and one court cannot declare it to be different from what another court has determined it to be, without the one, or the other, being in the wrong.

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It

Sect.
II.

It is therefore only in the character of judges, and as men appointed, upon oath, to declare and expound the law of elections, that I think the members of one Committee are (under certain restrictions) bound to adhere to former decisions of the same questions.

[23] Those who think differently, must build their opinion upon one of two grounds: believing, either, that the reasons, which render precedents of authority in the Courts of Westminster-hall, will not apply to Committees of the House of Commons; or (if they should apply), that the proceedings and determinations of those Committees, cannot be preserved and reported, in so complete and authentic a manner, as those of courts of law.

On the first of those heads, it will be proper to examine what the reasons are, which give to precedents of cases adjudged in the courts of law, the authority which they undoubtedly possess. “If,” says the Commentator on the Laws of England (1), “It is asked how the general customs or maxims, “which form the law of the land, are to be known, “and by whom their validity is to be determined, “the answer is, by the judges, in the several courts “of justice. Judicial decisions are the principal “and most authoritative evidence, that can be “given, of such a custom as shall form part of “the common law. It is therefore an established

(1) Blackst. Com. vol. i. p. 69. 4to.

“ rule to abide by former precedents, where the
“ same points come again in litigation; as well to
“ keep the scale of justice even, and not liable to
“ waver with every new judge’s opinion; as also,
“ because the law, in that case, being solemnly de-
“ clared and determined, what before was uncer-
“ tain, and, perhaps, indifferent, is now become a
“ permanent rule, which it is not in the breast of
“ any subsequent judge to alter, or vary from, ac-
“ cording to his private sentiments, he being
“ sworn to determine, not according to his own
“ private judgment, but according to the known
“ laws and customs of the land; not delegated to
“ pronounce a new law, but to maintain and ex-
“ pound the old one.”

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Now does not every one of those reasons apply, with equal force, to courts for trying controverted elections? Do they not equally apply to all courts of justice, in every free country? They certainly do. And why? Because they are founded, not on any positive regulations of the courts of Westminster-hall, nor any arbitrary written institutions, but on the universal and immutable basis of justice, sense, and policy. Indeed, it is an observation well warranted by history, that justice has been impartially, and consistently administered in different countries, and in different tribunals, in proportion to the authority which has been given to former decisions, in the trial of subsequent causes. It is that alone, which can keep the scale of justice even, and prevent it from wavering with

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Sect.
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the different opinions of different judges, and from rising or falling with their different prejudices, and biaſſes, either of inclination or intereſt. Nay, we may go farther, and ſay, that it is to that, more than any other cauſe, that we owe the admirable uniform ſyſtem of law, which diſtinguiſhes the Engliſh conſtitution ſo much, from that of moſt other countries. To attain the ſame uniformity and conſiſtency in the law of elections, which prevails in every other branch of our law, was, I am perſuaded, one of the great objects of the legiſlature, when they paſſed the ſtatute of the 10th of Geo. III. and therefore it is to be wiſhed, that a doctrine may never be countenanced, either by lawyers, or members of Parliament, which would effectually deſtroy that chief purpoſe of the ſtatute.

But it will be ſaid, that men choſen by ballot, and, therefore, many of them unacquainted with the law, cannot be competent judges of it, and that, conſequently, it would be abſurd, to give, to a deciſion of theirs, equal weight with a ſolemn determination of a court of common law, compoſed of men who have the advantage of the *viginti annorum lucubrationes*, and, by their perſonal knowledge of the deciſions of their predeceſſors, and the *præteritorum memoria eventorum* (1), are enabled to declare what the law is, and has been.

In answer to this, in the firſt place, ſome, perhaps, will think, that men of good ſenſe, whoſe

(1) Blackſt. Comm. loc. cit.

minds have been enlarged by education, assisted by the nice discussion which able Counsel, opposed to each other, always give to every litigated question, are nearly as capable of deciding a new point, as men of more practice and experience; and that, with the same assistance, when the point is not new, they will have the precedents laid before them; and will then, in like manner, be equally capable of squaring their's with the former determinations. In the mean time, if the design of the present imperfect undertaking should stimulate others, more able than I am, to continue to report the decisions of succeeding Committees, future Committee-men will have themselves to blame, if they are not acquainted with them. Young members will recur to the experience of the old; and every general election will produce a sort of public school of election law, where they may, by degrees, become possessed of the *præteritorum memoria eventorum*, as much as the judges of Westminster-hall.*

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In the second place, it is to be considered, that many points are, as to the public, indifferent in themselves, and, therefore, it is not of much consequence how they are at first decided, though it is of the utmost consequence, when once they are decided, not to alter them. In Westminster-hall, the judges have been so sensible of this, that, when points have been determined, in times less en-

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* [What is here surmised has been fully verified by the event.]

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lightened, or by judges of less liberal minds, than their own, in a manner which they have thought unreasonable, yet, because they were so determined, they have held themselves concluded, and bound by them. To illustrate this, I will mention two remarkable instances.

At a very early period, the following rule was established by the courts of law (1), "That, when in any deed, conveyance, or settlement (and soon after the statute of wills, it was extended to them (2), an estate is given to a person for *life*, and in the *same* instrument, the remainder, after the determination of such life-estate, is limited to the heirs of his body, or to his heirs for ever, he shall be held to gain by such deed (or will) an estate in tail or in fee."

[29] It is agreed, that this rule was founded on a direct violation of the intention of the parties; which is the general and most rational guide, in the construction of legal instruments; it is agreed, that the reasons for establishing such a rule were oppressive at first; being contrived to secure to the lords, the reliefs and other fruits of tenure, which accrued, when an heir *succeeded* to his ancestor by *descent*, and which he would not have been liable to, if his father by a limitation, such as has been described, could have given him his estate by *purchase*, or, in other words, have conveyed it to him by a specific instrument, instead of suffering it to

(1) Co. Rep. I. p. 104. a. (2) Co. Rep. I. p. 66. b.

fall to him by the operation of the law of succession; and it is also agreed, that such reasons no longer exist: yet, after all, such is the weight of precedent with the sages of the law, that in many late cases, they have, after the most solemn argument and deliberation, determined, that they cannot overturn the rule, or alter it.

The other instance is equally remarkable. By a statute of Queen Elizabeth (1), certain ecclesiastical leases can only be made for twenty-one years, or three lives, *from the time of making them*: if for a longer term, they are void. Not long after this law passed, it was adjudged (2), that if a person empowered to make leases under the statute, should grant one to commence *from the day of the date*, and should deliver the lease on the day of the date (which would therefore be the time of making it) such lease would be void; for "*from the day of the date*" was held to be *exclusive* of that day; and consequently the lease was for more than twenty-one years, from the time of making it, and contrary to the power given by the statute. But if such lease run thus, "*from the date*," then it would be good; that expression being understood to mean from the instant of the date, and therefore to *include* the day.—In like manner, when a tenant for life has power to make leases for twenty-one years *in possession, and not in reversion*, and he uses

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(1) 13 Eliz. cap. 10.

(2) Bacon's Abr. Title *Leases*,
p. 340, 341.

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the above expression, “*from the day of the date,*” in a lease, it has been determined that he thereby describes an estate to commence *in futuro*, or in *reversion*, and consequently beyond the power; that is, if the lease be delivered on the day of the date, which is always presumed, unless the contrary appear (1). I myself have heard the great person,* who is now at the head of the common law, say, more than once, that he, and the other judges, lamented, that so narrow and illiberal a construction had ever prevailed, seeing that, in common parlance, “*from such a day,*” may either be *inclusive* or *exclusive* of that day, and that, in the cases just mentioned, the parties must be presumed to have meant what they were entitled to do, and therefore to include the day; but, he added, that the point having been settled by former judgments, they could not now depart from it.†

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These two examples, among innumerable others, prove how conclusive precedents are in the courts of common law, and how unwilling the judges are to break through the uniformity of decision, even where they disapprove of the original determination.

(1) 2 Inst. 674.

• [Lord Mansfield.]

† [They did depart from it afterwards, in the case of *Pugh v. Duke of Leeds*. Mich. 18 Geo. III. Having there determined, that a lease to begin *from the day of the date*, granted under a power to make leases in *possession*, but not in *reversion*, was good. However, they made this decision, after a full investigation of all the cases, on the ground that the point had not been so strongly, directly, and repeatedly determined, as they had formerly supposed.]

And

And what reason can be given for their scrupulous adherence, in such cases, to what has been done by their predecessors, which will not, in similar instances, apply to election Committees, and to every court of justice?

Indeed, I think it may be fairly asserted, that the legislature itself, by the statute of the 2d of Geo. II. (1), has declared and established the authority of precedents, in matters of election law. For what is the meaning of making the last determination of the House final? Is it not saying, that an adjudged point (however improperly determined at first) shall be conclusive, and binding, in all succeeding cases? And this too regards the most important of all points, that could come before the House in its judicial capacity, viz. the right of election. It is probable that, since the late act passed, there will be few, or no determinations of the House on that right, in places which still continue what are called maiden boroughs; for such determinations can hardly be made, unless in consequence of a special report on the subject, from a Committee to the House; and special reports seem to meet with so little encouragement, that one may venture to foretell that they will not be very frequent. But, this being the case, ought not Committees to give the more particular weight to resolutions and decisions of preceding Committees, on questions concerning the right of election, as the

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(1) 2 Geo. II. cap. 94. § 4.

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only means now left of preserving the spirit of the statute of Geo. II. which otherwise will be lost, with all its advantages, and, in a manner repealed, by the 10th Geo. III. as far as concerns the maiden boroughs just mentioned; though surely nothing was farther from the intention of the person who imagined that act, or of the Parliament that passed it?

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Having endeavoured to prove that precedents ought to bind Committees of elections, in their decisions, this doctrine will not at all be impeached by what I am ready to acknowledge, that their authority is, and ought to be, subject to many qualifications and restrictions. They must not be *flatly unjust, or absurd* (1); they must be decisions of points immediately before the court, and absolutely necessary to the determination of the cause; they must not be hasty opinions, formed, and adhered to, before the question has been argued by the Counsel on both sides; they will have most weight when agreeable to general principles, and consonant to other determinations; a succession of similar decisions will, as they accumulate, give a growing authority to the first adjudication; and a point so confirmed will be much more irresistible than the first judgment of a Committee, acting in the infancy of this new tribunal; finally, there is no doubt, but that the comparative learning and merit of the majority of those who compose different Commit-

(1) Blackst. Comm. vol. i. p. 70. 4to.

tees, will reflect a comparative lustre and credit on their respective proceedings; in like manner, as a decision of a Coke, a Hale, or a Holt, carries with it a sort of authority much more forcible than that of more obscure, or less virtuous judges.

The second head of objection to the authority of precedents in election cases is, that their history cannot be preserved in a manner equally complete and authentic with that of the cases decided in the courts of common law. But that there is not much foundation for such an opinion, will appear, by considering the nature of our law reports, which (next to the statutes and judicial records) are of the greatest authority in Westminster-hall.

In every cause tried and determined at law, there are certain formal technical proceedings, called Pleadings, which must always usher in the cause, and ripen it, either for the determination of a jury, and the judgment of the court, or, if no question of fact arises, simply for the judgment of the court. These pleadings, together with the verdict and judgment, are preserved on record; and they, so far as they go, are of so high a nature, that nothing can be given in evidence to contradict them. But we should be very much at a loss indeed, if we knew nothing more of former decisions, than what they teach us. Unless where there has been a special verdict, the facts, on which any question of law arose, do not appear; and, except in cases of demurrer, the questions of law are not stated in the record; so that in a thousand instances, the ablest
pleader

pleader would find it difficult, or impossible, to decypher, by a perusal of the record, what the point of law was, which the court determined, and on which the cause turned.

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To supply this deficiency, therefore, it has been an uninterrupted practice, at least ever since the reign of Edward II. (1), for certain persons who attend the courts, to commit to writing, as accurately as they can, the state of every remarkable case, the points of law arising upon that case, the arguments of counsel, and the decision of the court. Formerly this was done officially, by the principal clerks of the court (2); but, ever since the reign of Henry VIII. it has been left to the discretion of any individual, who might find himself disposed to take the task upon him: and the consequence of this has been, that our reports, since that reign, have been compiled by people of different descriptions; judges, gentlemen of the bar, or clerks in court. Till of late years, indeed, it has been customary, when a collection of reports was published, to obtain a sort of attestation of the Chancellor, and the twelve Judges of England, to be prefixed to them. But this only contained the testimony of the Judges to the abilities of the reporter. It neither expressed, nor implied, any knowledge they had of the authenticity of the reports; nor were they at all supposed to have examined, or perused the work. This idle ceremony

(1) Blackst. Comm. vol. i. p.

(2) Blackst. l. c.

has, therefore, in some recent instances (2), been dropt, and the merit of reports now rests ostensibly, as, in substance, it always did, on their own intrinsic merit, and the internal evidence of their accuracy.

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Why then cannot an individual, who attends the proceedings in an election cause, and who commits them to writing in the Committee-room as they take place, give as complete a history of that cause, as the same individual could of a cause in a court of common law? If there is any difference, he certainly may execute the former task better than he could the latter; first, because the causes being in general much longer, and the same arguments and facts often repeated, he has more opportunities of setting right any mistakes he may have made; and, secondly, because in Committees, the evidence is taken down in writing, by a clerk, who attends for that purpose, and copies of the minutes are always given, if desired, to the agents, so that the greatest authenticity may, if necessary, be attained as to the facts.

The only material difference is this, and, it must be owned, that it is a great one. In the courts of law, the judges deliver their opinions, or, when they are unanimous, the Chief Justice delivers the opinion of the court, or the reasons on which the judgment is formed. It is to be wished that this were practised by Committees. But, in the mean

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(2) See the Prefaces to Mr. Justice Foster's Reports, and to Sir James Burrow's Reports.

time,

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time, it must be observed, that not all the reasons thus given by a judge for a judgment, but only such as follow, *ex necessitate*, from the comparison of the decision with the state of the case, are binding in succeeding cases. A judge sometimes, in delivering an opinion, travels out of the subject, and falls into vague reasoning, deciding extrajudicially questions not before him; and I believe it is understood that, though, when the judges are unanimous, the Chief Justice delivers the opinion of the court, yet the other Justices are not presumed to adopt, and concur with every doctrine that falls from him, in the course of that opinion. Now it is evident that in election cases, as well as in causes tried at common law, by comparing the determination with the state of the case, we may discover what points were necessarily decided. Lastly, from the length of time employed in most election causes, it is possible to have the arguments of counsel on both sides, at more length, than we can in cases determined in the courts of Westminster-hall; and, when they are fully reported, it is fair to conclude, as is done with regard to cases decided in the House of Lords, that the judgment proceeded upon some of the reasons suggested by the advocates for the successful party.

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Having said so much in favour of the reports which *might* be made of election causes, I with some confusion contemplate the following collection, of whose deficiencies, I am sure, I am at least

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as sensible as any of those can be, who may have occasion to consult it. It will in the mean time be proper to mention, that, for the most part, I attended the Committees myself through the whole course of their proceedings, except where two, or more, were sitting at once, or where the cause was merely an enquiry into disputed facts, and, as it were, a congeries of *nisi prius* causes. As to such cases, though, for the sake of mentioning every one that was tried during the session, I have inserted them; yet, as they did not turn upon questions of law, I took no pains to give a full history of them, but have only preserved the general heads, together with the event, and any points of evidence which I thought deserved to be remembered. When any accident happened to prevent my attendance, I had often the good fortune to receive from the best authority, (that of the counsel on both sides) an account of the questions and arguments. Indeed, if there is any degree of merit in any part of this work, it is greatly owing to the most ready communication of papers and notes, which I received from some of my friends at the bar.

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Where the whole cause turned upon a mere question of law, I have been careful to state it, as nearly as I could, in the very words in which it was stated by the counsel. Where the question of law arose out of admitted facts, I have transcribed those facts from the paper containing them, given in to the Committee, by consent. Where it seemed proper to report the facts, and they were not

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agreed upon, but proved by evidence, I have from the mouth of the witnesses, taken down what they proved, with a scrupulous intention (at least) of being accurate; and in several instances, I have had an opportunity of comparing my notes with the minutes of the clerk. Where the Committee, by a formal resolution, determined any preliminary point, I have most commonly given that resolution in the very words of the chairman.

I have examined every reference to the Journals in the original, without trusting, in a single instance, either to Carew, or the octavo book on the law of elections; and I have transcribed all the last determinations, as well those concerning the places where the present causes arose, as those which were cited in argument, with the most punctilious attention; and the cases in the Journals, which were either mentioned at the bar, or which appeared to me so apposite to the illustration of the case which I was reporting, as to deserve being inserted in the notes subjoined to that case, I have also transcribed with the same exactness.

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In the account of the arguments of counsel, I have thought it most consistent with my design, to give all those on one side together, without distinguishing those of the different counsel, because there must, of necessity, be a degree of repetition when two people speak largely on the same subject. For a similar reason I have frequently intirely omitted the replies.

To conclude; it is proper to warn the reader
(though

(though it will probably occur of itself) that the arguments of counsel, contained in the following reports, are not to be considered as their private opinions on the different questions; but merely as topics, furnished by the learning and ingenuity of advocates, in behalf of their clients. On this subject I am sure all the gentlemen at the bar will be ready to adopt the words of Cicero, in his oration for Cluentius. *Sed errat vehementer, si quis in orationibus nostris, quas in judiciis habuimus, auctoritates nostras consignatas se habere, arbitratur* (1).

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SECTION III.

Of the Constitution of Committees for trying controverted Elections, and the Manner of proceeding in them.

EVERY court of justice has a peculiar constitution, which it derives, in part, from its original institution, and, in part, from its establishing for itself, such rules and forms of procedure, as are found most suitable to the nature of the business, which comes before it. The method of forming Committees of election has many singularities in it, which embarrass those who are not much accustomed to the perusal of statutes, by an appearance of intricacy; and the mode in which causes

(1) Pro Cluent.

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are carried on, in those Committees, differs, in several respects, from the practice of Westminster-hall. For these reasons, it may be useful to give, in this place, a distinct view of both. Of the one, by moulding together the two acts of the 10th and 11th of the present King, and divesting them of the superfluities of statutable language; and of the other, by digesting those forms which all the Committees, that sat last winter, adopted, with regard to the method in which counsel are to proceed at the bar, the examination of witnesses, and the reports to the House.

Some, perhaps, will, at first view, think that I have, on those subjects, entered into too minute a detail. But they will probably alter their opinion, if they reflect on the difficulties and confusion, which the ignorance, or neglect, of form and order, so often occasion in the conduct of business.

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I. By an order of the house (1) renewed at the beginning of every new session, every petition complaining of an undue election, or return, must be presented within fourteen days after the date of that order, and so within fourteen days next after any new return shall be brought in (N).

II. If the House is not actually sitting on the last day of the fortnight limited by the above-mentioned order, by an equitable construction it has been determined to be sufficient, that the petition be presented on the first day when the House sits after the expiration of the fortnight (O).

(1) Votes, 5 Dec. 1774, p. 5.

III. No such petition can be taken into consideration till fourteen days after the beginning of the session in which it is presented, nor till fourteen days after the return to which it relates, shall be brought into the office of the clerk of the crown (1).

IV. It was resolved by the House, in the beginning of the last session, that, according to the true construction of 10 Geo. III. whenever a petition shall be offered to be presented within the time limited, it shall be delivered in at the table, and read, without a question being put upon it (2).

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V. By a resolution of the House, renewed at the beginning of every session, in all cases of controverted elections for counties, in England and Wales, the petitioners, by themselves, or their agents, must, within a convenient time, to be appointed by the house, deliver, to the sitting members, or their agents, lists of the voters for the sitting members to whom they intend to object, in which they must state the several heads of objection, opposite to the names of the persons objected to; and the sitting members, or their agents, must deliver, within the same time, similar lists to the petitioners or their agents (3) (P).

VI. A great many petitions having been offered to be presented at the same time, in the beginning

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(1) 11 Geo. III. cap. 42.
§ 2.

(2) Votes, 8 Dec. 1774, p. 12.

(3) Votes, 5 Dec. 1774, p. 3.

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of the last session, the House resolved, that whenever more than one petition, complaining of an undue election, or return, for the same, or for different places, shall at the same time be offered to be presented to the House, the Speaker shall direct all of them to be delivered in at the table; and that the names of the counties, cities, boroughs, or places to which they relate shall be written on several pieces of paper of an equal size, which are to be rolled up, and put by the clerk into a glass, or box, and then publicly drawn by the clerk, and the petitions read in the order in which the names are drawn (1).

VII. When a petition is read, a day and hour are appointed for taking it into consideration.

VIII. The House may alter the day appointed for the consideration of any petition, and appoint a *subsequent* day, giving notice to the parties (2).

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IX. Before the statute of 10 Geo. III. an annual order was always made for proceeding first to the consideration of petitions concerning double returns (Q). The order has not been renewed since; however, last winter, this preference was shown to the petitions from Milborne-Port, and Morpeth, the first relating to a double return, and the second complaining of a false return. They were read, and days appointed for the consideration of them, before the ballot for the others (3).

X. When the time for taking any petition, or

(1) Votes, 6 Dec. p. 18.

(3) Votes, 6 Dec. p. 18.

(2) 10 Geo. III. c. 16. § 3.

petitions, into consideration is appointed, an order is made for the Speaker to issue his warrants for such persons, papers, and records, as shall be thought necessary by the several parties, on the hearing of the matter of such petitions (1).

XI. On the day appointed for the consideration of any petition, or petitions, the House cannot previously enter on any other business, except the swearing of members (2); and, if there are not one hundred members present, the House must adjourn to the following day, (unless it be Sunday, or Christmas-day) and so on from day to day, till the requisite number of an hundred are present (3). There has been but one instance hitherto, where an adjournment has been necessary on this account, viz. in the case of Clackmannanshire (4).

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XII. When the hour appointed for taking any petition into consideration is come, the serjeant at arms is directed by the Speaker, to go, with the mace, to the places adjacent, and require the attendance of the members, on the business of the House (5).

XIII. If the number is complete, the counsel and agents for the parties attend at the bar, and the doors of the House being locked, the names of all the members written on distinct pieces of paper, are put, in equal number, into six glasses, and the

(1) Loc. cit.

(4) Vide infra Case XXI.

(2) 11 Geo. III. cap. 42. § 4.

(5) 10 Geo. III. cap. 16.

(3) 10 Geo. III. cap. 16. § 4. § 4.

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clerk draws out a name alternately from each glass, which is delivered to the Speaker, and read by him; and so on till forty-nine names of members then present are drawn (1).

XIV. If the name of any member is drawn who has voted at the election complained of, or of one who is either a petitioner, or petitioned against, or whose return has not been fourteen days in the office of the clerk of the crown, or of one not then present, his name is set aside, and does not go to make up the number of forty-nine (2).

XV. If the name of any member is drawn, who will make oath that he is sixty or upwards, or verify upon oath any other excuse which the House shall approve of, or who has served upon any other Committee in the course of the session, he (if he requires it) is excused, and another name drawn in his stead (3); and so it is if the member's name is drawn who is intended for the nominee of either of the parties (4).

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The form of the oath by which any excuse is to be verified is as follows. "The matter alledged by you, and now taken down and read, as an excuse for not serving on this Committee, is the truth. So help you God (5)."

XVI. But the excuse of having served on a

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| (1) 10 Geo. III. cap. 16. | (4) 10 Geo. III. cap. 16. |
| § 5. | § 15. |
| (2) Ibid. § 6. | (5) 11 Dec. 1770. Journ. |
| (3) § 8, 10. | vol. xxiii. p. 59. col. 1. |

former

former Committee during the session, cannot be allowed, if the House shall have come to a previous resolution, that the number of members who have not served is insufficient to answer the purposes of the statute. And no member, who, after having been chosen to serve on a former Committee, has, from inability or accident, been excused from attending it throughout, can avail himself of such excuse (1).

XVII. If the number of forty-nine, not set aside, nor excused, cannot be completed, the House must adjourn in the same manner as in the case where there are not an hundred present (2).

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XVIII. When there are but two distinct parties, the petitioner, or petitioners, and the sitting member, or sitting members, name each one from among the members there present, who are not of the forty-nine (3).

XIX. If either of the parties, or both, decline their right of nominating, the want of such nomination is supplied by drawing the name of one or two members in the same manner as the forty-nine are drawn (4).

XX. The two nominees (for they are generally so called even in the latter case, though improperly) are liable to the same objections, and entitled to the same excuses, as those drawn by lot; and in

(1) 10 Geo. III. cap. 16.

(3) 10 Geo. III. c. 16.

§ 8.

§ 11.

(2) 11 Geo. III. cap. 42.

(4) § 15.

§ 3.

case of such objections, or excuses, others are to be nominated in their stead (1).

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XXI. The doors of the House are then opened; two lists of the forty-nine are prepared, one of which is delivered to the counsel for the petitioners, and the other to the counsel for the sitting members; the parties, with their counsel and agents, withdraw, together with the clerk of the committee; and the parties strike off, alternately, one from the list of the forty-nine, (the petitioners beginning) till the number is reduced to thirteen. This must be done within an hour (2).

XXII. Then the thirteen, together with the two nominees, take the following oath, which is administered at the table by the clerk, in the same manner as the oaths of supremacy and allegiance are (3).

“ You, and each of you, shall well and truly
“ try the matter of the petition of A. B. referred
“ to you, and a true judgment give, according to
“ the evidence. So help you God (4)”.

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XXIII. The House then appoints a certain time for the meeting of the Committee, which must be within twenty-four hours, and is generally forthwith; and none of the fifty-one must leave the house till that time is fixed (5).

XXIV. When there are more than two parties

(1) 10 Geo. III. c. 16. § 12. (4) § 13. Journ. vol. xxxiii.

(2) 10 Geo. III. § 13. p. 59. col. 2. 11 Dec. 1770.

(3) § 29.

(5) 10 Geo. III. § 13, 14.

before the House on distinct interests, each of the parties strikes off one successively from the forty-nine, till the number is reduced to thirteen, the order of their beginning being determined by lot, after they withdraw from the bar (1).

XXV. In such case, none of the parties appoint a nominee; but, as soon as the list of the thirteen is given into the House, they (the thirteen) withdraw, and within an hour choose two members present at the ballot, whose names have not been previously drawn; and, if they are not set aside, or excused, on the grounds already mentioned (XIV. XV.) the fifteen are sworn in the manner above described. XXII. (2).

XXVI. In such case too, none of the members present at the ballot, are to depart from the House, till the time for the meeting of the Committee is appointed (3).

XXVII. Both before the House of Commons, and the House of Lords, and in all Committees of either, one party can have but two counsel (R). When there is but one petitioner, or when there are two, and they unite in the same petition, they have but two counsel. And, in like manner, when the election of two fitting members is complained of on the same grounds, they have only two counsel.

XXVIII. In most cases there is a separate petition from certain electors, or persons claiming a

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(1) 11 Geo. III. c. 42. § 6.

(2) § 6.

(3) § 7.

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right to vote, in the interest of the unsuccessful candidate. They are sometimes allowed one counsel (1); but they are not considered as distinct parties, so as to be entitled to strike off any names from the forty-nine (2).

XXIX. When there are two petitioning candidates, who present distinct petitions, containing different allegations, each of them is entitled to two counsel, and the Committee is formed as described XXIV. XXV.

[57] XXX. If the cases and interests of the two sitting members is distinct, each of them likewise is allowed distinct counsel, and the Committee is formed in the same manner XXIII. XXIV (3) (S).

XXXI. When the Committee meets at the time appointed by the House, they elect one of the thirteen, who were chosen by lot, to be their chairman; and in case of an equality of voices, the member who was first drawn, has a casting vote at this election of a chairman; and there is a similar provision if, in the course of a cause, from the death or absence of the first, there should be occasion to elect a new one (4). This is all the business which is done that day, after which the Committee adjourns till the next, commonly at ten o'clock, and continues sitting every day from ten, to about three.

XXXII. They meet every day, except on Sun-

(1) As in the cases of Down-
ton and Bedford.

(3) See the cases of Hindon,
Bristol, and Dorchester.

(2) 11 Geo. III. cap. 42. § 6.

(4) 10 Geo. III. cap. 16. § 17.
days,

days, and Christmas-day, and cannot adjourn for more than twenty-four hours, exclusive of Sunday, or Christmas-day, without leave obtained from the House, on motion, and special cause assigned for a longer adjournment (1).

Sect.
III.

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XXXIII. No member can absent himself without leave obtained from the House, or an excuse allowed on special cause verified upon oath (2). If any one does, the chairman must report it to the House, who will direct the Committee to proceed without him; and he is ordered to attend, and taken into the custody of the serjeant at arms, and otherwise punished at the discretion of the House, unless it shall appear, by facts verified upon oath, that his absence was occasioned by sudden accident or necessity (3).

XXXIV. The Committee can never sit on any day, until those members are assembled, who have not been excused; and if they do not all meet within an hour of the time to which the Committee adjourned, they must adjourn again; the chairman reporting the cause of such adjournment to the House (4).

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XXXV. If more than two members are absent, whether on leave, or not, the Committee must adjourn from time to time, until thirteen are present (5).

(1) 10 Geo. III. cap. 16.
§ 19.

absence of Mr. Grey, in the case of Downton. See also the case of Hindon.

(2) § 21.

(4) § 21.

(3) § 22. See the proceedings in the House on the ab-

(5) § 23.

XXXVI.

Sect.
III.

XXXVI. In case the number of the members be reduced unavoidably, by death or otherwise, under thirteen, and continue so during three sitting days, *that* Committee becomes *ipso facto* dissolved, and all its proceedings void; and a new Committee must be chosen (1).

XXXVII. If the Committee have occasion to make any application, or report to the House, in relation to adjournment, absence of members, or non-attendance or misbehaviour of witnesses (vide infra XLIII.) and the House shall be then adjourned for more than three days, the Committee may adjourn to the day appointed for the meeting of the House (2).

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XXXVIII. The Committee have power to send for persons, papers, and records. They are to examine all the witnesses who come before them upon oath, and to try the merits of the return, or the election, or both (3).

XXXIX. The regular method of conducting every cause, seems to be this.—The petition or petitions, being read, if the right of election be in dispute, and there is a last determination of the House, that too is read, and then the standing order of Jan. 16. 173 $\frac{5}{6}$ (4).

After this, the senior counsel for the petitioners opens their case, stating what facts they mean to

- (1) 10 Geo. III. cap. 16. § 24. (3) 10 Geo. III. cap. 16. § 18.
(2) 11 Geo. III. cap. 42. § 5. Port. (4) See the Case of Milborne

prove,

prove, and the points of law they mean to rely upon.

The evidence to prove the case of the petitioners is then gone into, whether written, or oral, and the following oath is administered to every witness.

“ The evidence you shall give to this Committee shall be the truth, the whole truth, and nothing but the truth. So help you God.”

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If the examination of a witness lasts more than one day, or if the same witness is called more than once, on different days, the oath is always administered anew, every day.

When a witness is under examination, all those who are intended to be called afterwards on either side, are ordered to withdraw; after which, if they remain in the Committee-room, their evidence will not be received.

In examining a witness, one of the counsel, who calls him, begins. He is then cross-examined to the same facts by the counsel on the other side, and also to any other matter which he thinks of use to the cause of his clients. Then the counsel who began the examination, re-examines him to the new matter suggested by the other side, to which the re-examination must be confined. The members of the Committee then put such questions as occur to them; or if any new questions occur to any of the counsel of either side, as they cannot then regularly put them themselves, they suggest them to one of the members

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Sect.
III.

bers of the Committee, who asks them of the witnesses.

The evidence for the petitioners being closed, the junior counsel on that side sums it up, and draws his conclusions from it, against the sitting members, and in favour of his own clients.

Then the senior counsel for the sitting members, after remarking upon the evidence which has been produced, and endeavouring to impeach its validity, or the conclusions drawn from it, proceeds to open the case against the petitioners (if there are objections either to their eligibility, or to their votes.) Evidence is called to support this new case, which is gone through in the manner just described. Then the junior counsel, on the same side, sums it up, and the senior counsel for the petitioners replies to the whole.

When there is only one petitioner, and two sitting members, or one petitioner, and one sitting member, the order of the proceeding is of course the same in every respect.

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XL. When the counsel have closed their evidence, and arguments, they are directed to withdraw, and, the court being cleared (T), the Committee settle their opinion among themselves; determining any point on which they differ, by the majority of voices. If the voices are equal, the chairman has a casting vote (1).

XLI. Though the established method seems to be, that the counsel for the petitioners begin by

(1) 10 Geo. III. cap. 16. § 27.

opening the whole of their case, yet, when it happens to consist of several questions, and the determination of one would render the discussion of the others unnecessary, (as, for instance; if the objections to a sitting member are, first, that he was not eligible, and, secondly, that he had not the majority of legal votes) (U) the Committee will then, with the consent of the parties, divide the case into the separate questions (1). The proceedings on each separate question are exactly in the manner which has been described (XXXIX). When the Committee have come to a resolution, upon such distinct question, the counsel being called in, it is read to them by the chairman. When the determination of the first question is sufficient for the decision of the cause, the others are not proceeded upon.

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XLII. If, during the course of the evidence, any objection is taken to the admissibility of any part of it, both the counsel, on the side from whence the objection comes, speak to it, and being answered by both the counsel on the other side, the senior replies; and then, if there appear to the Committee any difficulty on the subject, the court is cleared, and the counsel, when they are called in again, receive from the chairman the directions of the Committee, whether the evidence is to be admitted, or rejected.

(1) See the cases of Bristol, Dorchester, Bedford, Lanerk and North Berwick.

XLIII.

Sect.
III.



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XLIII. If any person, summoned as a witness before the Committee, prevaricate, or misbehave, in giving or refusing to give evidence, the chairman, by the direction of the Committee, may, at any time, during the course of the cause, report this matter to the House, for the interposition of their authority or censure (1) (V.)

XLIV. The report of the Committee, containing their determination, whether the petitioners, or sitting members, or either of them, are duly returned, or elected, or whether the election is void, is conclusive between the parties, and binding on the House (2). And it is of course ordered to be entered in the Journals, and directions are given for the necessary alteration of the return (W), or for issuing a new writ, as the case requires.

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XLV. If the Committee come to any resolution besides the determination just mentioned, they may, if they think proper, report it to the House, at the same time that their chairman communicates such their determination. But as to such special resolution, the House is left at liberty either to disagree with, or confirm it (3).

(1) 10 Geo. III. cap. 16. § 26.

(2) § 18.

(3) § 25. See the Cases of Hindon and Shaftesbury.

N O T E S

TO THE INTRODUCTION.

Page 2. (A.) IN the year 1026, the emperor Conrad the Salic, in an assembly of the states of Lombardy, at Roncaglia, promulgated the first written law concerning feudal successions. Though in their origin, fiefs were held during the pleasure of the donor, and were afterwards first annual, and then for life, yet before that period, they descended to the sons, with the approbation of the lord. But hitherto such descent had been merely consuetudinary. In the abovementioned year, by a written constitution it was established, on the petition of the vassals, that the right of succession should extend to grandsons by sons, and failing them to brothers. In 1033, or 1037, Lotharius II. (otherwise called the Third) extended the succession to paternal uncles. Craig (as well as many foreign feudists) has committed a gross anachronism, in ascribing this last mentioned law to Lotharius I. grandson to Charlemagne, who died in the year 855. Giannone *Istor. di Nap.* tom. ii. lib. 9. cap. 1. In some countries on the continent the feudal succession at this day, does not go beyond a certain number of degrees.

Note
(A.)

P. 4. (B.) Prynne was of opinion that before the statute of 8 Henry VI. cap. 7. "every inhabitant and "commoner in each county, had a voice in the election of "knights, whether he were a freeholder or not." *Brevia Parl. rediviva*, p. 187. But he gives no authorities for this opinion,

Note
(B.)

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Note
(B.)

opinion, which does not seem to have been adopted by any body since.—In the case of Ashby and White, as reported by lord Raymond, Lord Ch. J. Holt says, “ Before the statute of Henry VI. any man that had a *freehold*, “ though ever so small, had a right of voting in counties.” Lord Raymond, p. 950.

Note
(C.)

P. 4. (C.) The different instances of parliamentary boroughs created, or revived, as well by the crown, as by act of parliament, previous to the reign of Charles II. are collected in one of lord Somers’ State Tracts, and may be seen at the end of the preface to Glanville’s Reports. In that reign, before the case of Newark happened, the prerogative of the King, in this respect, was called in question. Prynne in his *Brevia Parliam, rediviva*, though one of his great objects in that book seems to have been to raise the prerogative, and depress the authority of the House of Commons, says, p. 156, 158, “ that he is clear, that since “ the statutes of 5 Richard II. cap. 4. 1 Hen. V. cap. 1. “ and 23 Hen. VI. cap. 25. no boroughs can be *created* “ (or revived) but by special acts of parliament, such as “ those of the 27 Hen. VIII. cap. 26. 34 Hen. VIII. cap. “ 18. and 35 Hen. VIII. cap. 11. which enabled and au- “ thorized the Welsh shires, cities, and boroughs, and the “ county and city of Chester, to send knights and bur- “ gesses to parliament.” See also p. 238. b. Whitelock, on the contrary, in his *Commentary on the Parliamentary Writ*, admits the power of the Crown. “ The King,” says he, “ may give *by patent*, to as many towns as he “ pleases, the privilege of sending burgeses to parliament.” Vol. ii. cap. 103. p. 372. See also the same author, vol. i. p. 500, as cited in the case of Pontefract. It is observable, that both those works are dedicated to Charles II. In the case of Newark, the question was discussed in the House. The debate arose on the occasion of a petition of Mr. Henry Saville, who had been elected, under the new charter,

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charter, for that place. Journ. vol. ix. p. 389. col. i. 21 March, 1677. Three objections were taken to the charter. First, it was said, that the King had not the power at all: secondly, that if he had, still he could not limit the right of election to a partial number of the members of the corporation, which had been done in that case; and, thirdly, that he could not grant such a charter while the parliament was sitting. A. Grey's Debates, vol. iv. p. 297, to 304. The question being put, "That, by virtue of the charter granted to the town of Newark, the town of Newark hath right to send burgesses to parliament," on a division it passed in the affirmative 125 to 73. Journ. loc. cit. This case seems to have confirmed and established the prerogative of the King, although it was never afterwards exercised. After the Revolution it is recognized by Lord Holt, in the famous cause of Ashby and White already cited (Note B). His words are, "When the right of election is *granted* within time of memory, it is a franchise that can be *given* only to a corporation," and a few lines afterwards, adopting the words of the judges in the case of Dungannon, (cited *infra* in that of Poole,) "If the King grant to the *inhabitants* of Islington, to be a free borough, and that the burgesses of the same town may elect two burgesses to serve in parliament, such a grant of such privilege to burgesses not incorporated is void; for the inhabitants have not capacity to take an inheritance." He therefore did not doubt of the King's power to grant the privilege in question to a borough properly incorporated. The case of Ashby and White happened before the Union. Since that time, it seems to be understood, that the King cannot bestow a new right of sending members to parliament. By the treaty of Union, Art. XXII. there can be only forty-five members for Scotland, in the House of Commons. To encrease the number of members for England above five hundred and thirteen, of which the House consisted at that period,

Note (C.) would be to alter the proportional share of the nation in the legislative body, which proportion is one of the most important parts of the contract between the two kingdoms.

Note (D.) P. 5. (D.) For instances of the arbitrary authority assumed by the sheriffs with regard to the elections and returns for boroughs within their counties, see Prynne's *Brevia Parliam. rediviva*, p. 230, 231, 232, 233, 234, b. 235, 238, b. But this was restrained and abolished by the two statutes of the 5th of Richard II. Parl. 2. cap. 4. and the 23d of Hen. VI. cap. 14.

Note (E.) P. 5. (E.) "There are not above two or three cases of elections questioned or complained of, from the 49th of Henry III. till the 22d of Edward IV. for ought appears by the parliament rolls, and not so much as one double return or indenture." Prynne, *lib. cit.* p. 137. In the case of Onslow against Rapley, North Chief Justice said, "There were not less than seventy double returns in 1641." 3 Levinz, p. 30.

Note (F.) Ibid. (F.) Prynne (*lib. cit.*) has given us a very curious petition of the borough of Toriton to the King, praying to be discharged from the burthen of sending members to parliament; and there are many instances of such exemptions. "To be a burges of parliament, (says he,) or to find or send burgeses to it, was anciently reputed a matter of great pains and expences, yea a great damage and oppression to the burgeses themselves, and the boroughs that elected and paid them." P. 240.

Note (G.) Ibid. (G.) See those instances collected in the preface to Glanville's Reports. In the 29th of Hen. VI. there is a petition of a hundred and twenty-four freeholders of Huntingdonshire to the King, complaining of an undue election.
Prynne,

Prynne, lib. cit. p. 156, 158. From this, and other circumstances, Prynne infers, that the right of determining election questions was in the King, or the King and the House of Lords. "It is apparent that the King himself in that age, and not the House of Commons, or their grand Committee of Privileges (an erection of punier times unknown to our ancestors) was to redress and rectify all false and undue returns and elections of knights and burgesses *before* and *after* the sitting of Parliament, or else the King and House of Lords. As I have elsewhere evidenced by sundry precedents," lib. cit. p. 259, 260. Plea for the House of Peers, p. 371 to 416. Second Part of Brief Register and Survey of Parl. Writs, p. 118, 119, 139, 140.

Note
(G.)

P. 6. (H.) "The King in this parliament (4th Edw. III.) charged the earls, barons, and peers, to give right and true judgment against Simon de Bereford, knight, who had been aiding and abetting, and advising with Roger de Mortimer, in all the treasons, felonies, &c. Whereupon they came before the King, and said all with one voice, that the said Simon was not their peer, and therefore they were not bound to judge him. But," &c. They at that time passed judgment of death on several other actors in the murder of Edw. II. and the Earl of Kent; and at the close of all those judgments is another declaration of the peers, "That they should not be drawn into consequence, nor be made injurious to their *privileges* in time to come." Parliam. Hist. 2d. edit. vol. i. p. 224, p. 226. From Rot. Parl. A. R. R. Edw. III. 4to. Seld. Judic. in Parl. cap. 1.

Note
(H.)

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P. 10, 14. (I.) It may be proper in this place to trace the history of the former method of trying controverted elections in the House of Commons a little at large, as far as it can be collected from the Journals, which only begin in the reign of Edward VI. and are very imperfect till that of Charles I.

Note
(I.)

Note
(1.)

It appears that in the first year of Queen Mary, 12 Oct. a Committee of six persons was appointed to enquire whether Alexander Newell, burgess of Loo in Cornwall, prebendary of Westminster, might be of the House, and likewise for John Forster. Next day (13 Oct.) "It is declared *by the commissioners*, that A. Newell, being prebendary in Westminster, and thereby having voice in the convocation-house, cannot be a member of the House, and that the Queen's writ be directed for another burgess in that place." Journ. vol. i. p. 27, col. 2.

In 4 and 5 Philip and Mary, 27 and 28 Jan. two members having been returned each for a county and a borough, and having made their elections (or *personally appeared* as it is called in the Journals) for the counties, "It is required (in both cases) *by the House*, that another person be returned for the borough." Journ. vol. i. p. 47. col. 2.

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It would seem by Sir Simon D'Ewes's Journal, p. 438. that there was a standing committee of privileges and elections in Queen Elizabeth's time, 1588.

At the beginning of the first parliament of James I. immediately after the affair of Sir Francis Goodwin had been moved, a Committee of privileges and returns (as it was then called) was moved for, and appointed, consisting of twenty-five members; and in the entry of this motion it is said, "This is an usual motion in the beginning of every parliament, and the authority committed to this Committee was to examine all matters touching privileges and returns, and to acquaint the House with their proceedings, from time to time, so as order might be taken according to the occasion, and agreeable with ancient custom and precedent." 22 March 1604. Journ. vol. i. p. 149. col. 2. 150. col. 1.

The practice of appointing such a Committee at the beginning of every session of parliament continued ever after,

till

till 10 Geo. III. with only one interruption, which shall be taken notice of immediately.

23 Feb. 162 $\frac{1}{2}$. The Committee for Privileges (as it is then entitled) being appointed. "It was moved, that all "who come should have voices. Mr. Speaker putteth in "mind of the order of the House which never so in this.— "Resolved No. Question whether he persons nominated "only to be—Resolved Yea." Journ. vol. i. p. 671. [75] col. 2.

In 162 $\frac{1}{2}$. 2 March, a committee is appointed of twenty, "and all that will come to have voice." Journ. vol. i. p. 829. But this order was not renewed in succeeding sessions till 1673.

The number of the members appointed on this standing Committee encreased greatly. In 162 $\frac{8}{9}$, they amounted to eighty-five. In 1660 (from which time the title was a Committee of privileges and elections) they were between two and three hundred. So in 1661. 11 May. Journ. vol. viii. p. 247. col. i. &c.

In 1673. 30 Oct. It is ordered, that all who come shall have voices in the Committee. Journ. vol. ix. p. 284. col. 2. This order was always repeated afterwards when the Committee was named.

In the mean time, election causes were sometimes tried at the Bar of the House, on motion being made for that purpose. Vide Journ. vol. ix. p. 716. col. i. 23 May 1685, & *passim*.

In 170 $\frac{7}{8}$. 27 Jan. a Committee was appointed to consider of methods for the more easy and speedy trying and determining of controverted elections, of which all the gentlemen of the long robe were members. (Vol. xv. p. 516. col. 2.) And they reported, 18 Feb. three resolutions: the two first of which were, 1. "That all matters that shall "come in question touching returns or elections shall be "heard at the Bar of the House. 2. That all questions, at

Note
(1.)

“the trial of elections shall, if any member insist upon it, “be determined by ballot.” The third resolution will be mentioned in another Note (N). The three were agreed to by the House. The second and third made standing orders. (Journ. vol. xv. p. 551. col. 1. and 2.)

21. Feb. Several standing orders were made for regulating the manner of balloting. Journ. vol. xv. p. 559. col. 2.

Accordingly, in the same session, the merits of the election for Ashburton in Devonshire were heard at the Bar, and, the right of election coming in question, the ballot was demanded, and the question determined in that manner, 26 Feb. Journ. vol. xv. p. 577. col. 1, 2.

But it appears, that this was the only case so determined, and at the beginning of the very next session, which was the first of a new parliament, a motion being made, and the question put in the words of the second resolution of 18 Feb. the House divided, and it passed in the negative 178 to 169. 22 Nov. 1708. Journ. vol. xvi. p. 7. col. 1.

Afterwards, in 1710, at the beginning of the next parliament, an unsuccessful attempt was made to renew the trial by ballot. 9 Dec. “A motion being made, and the “question being put, that all questions upon elections and “returns of members to serve in parliament, be determined “by ballot, if demanded by any member.” The House divided, and it passed in the negative, 247 to 39. Journ. vol. xvi. p. 429. col. 1.

[77] The first resolution of 18 Feb. 170 $\frac{7}{8}$, was, however, renewed, 22 Nov. 1708; and instead of the usual Committee of privileges and elections, a Committee of privileges was chosen, vol. xvi. p. 6. col. 2. p. 7. col. 1. and all election causes, during that session, were tried at the Bar of the House. But, at the beginning of the next, a Committee of privileges and elections was appointed in the usual form, and so continued to be, till the first session after the act of 10 Geo. III. since which time only a Committee of
privileges

privileges has been appointed. In that interval, petitions were, as formerly, sometimes referred to the Committee, and sometimes heard at the Bar. In the two sessions before the act took place they were almost all heard at the Bar. Journ. vol. xxxii. p. 22. *§ infra*, p. 460. *§ infra*.

Note
(1.)

P. 10, 11. (K.) The claim of the Chancellor seems to have been this: "That, either on the suggestion of the sickness of the member for any place, or when a vacancy happened during the recess of parliament, he was entitled, and the proper person, to issue a new writ; and that the person returned upon such new writ ought to be received." In the famous case of Sir Francis Goodwin, the Chancellor had thought himself entitled to issue a new writ on the return of a person supposed to be ineligible, being an outlaw. 1604, 22 March. Journ. vol. i. p. 149. There is hardly any instance of the Chancellor's pretending to decide between two competitors. Indeed in those times, questions of elections were generally brought on, not by the contention of individuals who had been rival candidates, but from the jealousy of the House concerning its privileges.

Note
(K.)

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The House resolved, 18 March, 1589, "That during the sitting of this court, there do not, at any time, any writ go out for the choosing or returning of any knight, citizen, burgess or baron, without the warrant of this House first directed for the same to the clerk of the crown, according to the ancient jurisdiction and authority of this House, in that behalf accustomed and used." D'Ewes, p. 307, 308.

This resolution seemed to distinguish, as to the right of issuing writs, between the *actual* sitting, and the recess of parliament. Accordingly, in the case of Goodwin, just cited, the Chancellor still claimed that right on vacancies, or on the election of disqualified persons, during the recess. That the idea of such a distinction generally prevailed after the Restoration is evident from the words of Prynne, quoted

Note
(K.)

in Note (G.) In 1672, Lord Shaftesbury, then Chancellor, issued writs to fill up the vacancies which happened during the recess. But the new Speaker was scarce in the chair, “ (6 Feb. 167 $\frac{2}{3}$) before a member standing up, and “ looking about him, said, he observed several new faces “ in the House, and did not remember that, before their “ last sitting, the House had been moved for filling so many “ places, so he doubted the regularity of the sitting of those “ people, and moved that their titles might be examined.
 [79] “ Another member seconding, said he supposed those gentle- “ men would have the modesty to withdraw while their case “ was under debate, and not wait for the order of the House. “ So the whole set of new-elects, though mostly loyalists, “ filed out, and came in no more on that choice.” North’s Examín, p. 56. On the 4th of Feb. before the choice of the Speaker was approved of, (Journ. vol. ix. p. 245. col. 1.) a motion and complaint had been made on this subject, “ Which occasioned the King (5 Feb.) after the Lord “ Chancellor’s speech, to declare to the Commons, that he “ had given order to the Lord Chancellor to send out writs “ for the better supply of their House, having seen precedents for it; but if any scruple or question did arise about “ it, he left it to the House to debate as soon as they could.” Chandler’s Deb. vol. i. p. 169. 6 Feb. The House resolved, “ that warrants do issue under Mr. Speaker’s hand “ to the clerk of the crown, for the suspending of all the “ writs issued for elections of persons since the last session “ that were not executed *before the first day of the sitting of “ the House this session*, and for the making new writs in the “ room of those suspended.” Thus far the old idea of the distinction between the actual sitting and the recess seems to have been followed. But the matter being further debated, and a motion being made (by the court party) “ for a Com-
 [80] “ mittee to inspect the precedents touching elections and “ returns, and to report the matter to the House on Satur-
 “ day

“ day morning next, on a division it passed in the negative, “ 169 to 103.” The House then went into the debate of the matter of issuing writs, and making elections and returns of persons without order or warrant from this House, and several cases being cited, and the matter at large debated, and the general sense and opinion of the House being, that, during the *continuance* of the high court of parliament, the right and power of issuing writs for electing members to serve in this House in such places as are vacant, is in this House, who are the proper judges also of elections and returns of their members; thereupon it was resolved, “ That elections upon the writs issued *since the last session* are void, and that Mr. Speaker do issue out warrants “ to the clerk of the crown to make out new writs for those “ places.” Journ. vol. ix. p. 248. col. 1. In the course of this debate (which was very warm and angry) Mr. Poole referred to the resolution of 18 March, 1580, and explained it to mean from the *first day of sitting*, whether *actually sitting or not*. Grey’s Debates, vol. ii. p. 6. This is the construction virtually put upon it by the resolution of 6 Feb. 1677. None of the precedents cited in Grey, in favour of the Chancellor’s right, are clearly in point; and it was justly observed in the course of the debate that, if the Chancellor were to have such power, he would make himself judge of returns. Grey’s Deb. vol. ii. p. 5.

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One reason probably for supposing a power lodged somewhere for supplying vacancies during a recess, was the inconvenience of a seat remaining vacant the whole time of a long adjournment or prorogation, by which the disorder attending opposition among candidates was so much increased and protracted. This inconvenience has been, in a great measure, removed by the acts of 10 Geo. III. cap. 41. and 15 Geo. III. cap. 36. If a vacancy happen during a recess for more than twenty days, whether by prorogation or adjournment, in consequence of the death of a member, or his becoming a peer of Great Britain, *the Speaker of the House*

Note
(K.)

House of Commons is, by those acts, authorized and required, upon receiving a written certificate of the vacancy, under the hands of two members of the house, to cause notice thereof to be inserted in the London Gazette, and a fortnight thereafter, to issue his warrant for a new writ.

Note
(L.)

P. 15. (L.) In a former note (I.) we have seen that the attempt to establish a trial by ballot proved abortive. By 7 & 8 Will. III. cap. 7. § 1. it is enacted, "That, in case
"any person or persons shall return any member to serve in
"Parliament, for any county, city, borough, cinque-port,
"or place, contrary to the last determination in the House
"of Commons of the right of election in such county, city,
"&c. such return so made shall be adjudged to be a false
"return."

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This made the last determination of the House binding on returning officers. The House itself was still left open to the same arbitrary decisions as ever. But the statute of 2 Geo. II. cap. 24. § 4. enacts, "That such votes shall be
"deemed to be legal which have been so declared by the
"last determination in the House of Commons, which last
"determination concerning any county, shire, city, borough,
"cinque-port, or place, shall be *final to all intents and pur-
"poses whatsoever*, any usage to the contrary notwithstanding."

Note
(M.)

P. 17. (M.) Another statute passed in the following year, explaining and supplying some omissions in the first. 11 Geo. III. cap. 42. The statute of the 14th Geo. III. makes them both perpetual.

Note
(N.)

P. 46. (N.) The first order which appears in the Journals for limiting the time for questioning elections to a fortnight, was made in the first Parliament of Car. I. 18 Feb. 162 $\frac{1}{2}$ Journ. vol. i. p. 821. col. 2. From the beginning of the
Long

Long Parliament in 1640, it was continued every new session, till 1707, when the third resolution of the Committee mentioned in Note (I.) was made a standing order, viz. "That
" all petitions upon every new Parliament, relating to elections and returns, be delivered to the clerk of the House,
" and be laid by him upon the table, before the Speaker be chosen."

Note
(N.)

Though this was a standing order, it was renewed in the form of a resolution, together with the first (concerning the trials at the Bar of the House) at the beginning of the next Parliament, 22 Nov. 1708. Vol. xvi. p. 6. col. 2. p. 7. col. 1. The limitation of the fortnight was continued as to elections on vacancies during the continuance of a Parliament. The third resolution of 18 Feb. 170 $\frac{7}{8}$ was not afterwards renewed, but it continued a standing order, and was adhered to till 1722, when a Committee was appointed 31 Oct. (Journ. vol. xx. p. 50. col. 1.) to consider of that order, and in consequence of their report, 21 Nov. it was discharged from being one of the standing orders of the House. *Ibid.* p. 61. col. 1. Since that time the limitation after a general election has always been a fortnight, as well as after elections on an intermediate vacancy.

[83]

P. 46. (O.) This construction is established by three precedents.

Note
(O.)

24 March, 166 $\frac{1}{2}$. " Upon report made by Serjeant
" Charlton from the Committee of privileges and elections,
" that a petition was delivered in to the said Committee on
" behalf of Sir William Dudley on Saturday last, touching
" the election for the town of Northampton, but, by reason of the adjournment of that Committee, the petition
" was not delivered in by the precise time limited by the
" rule of this House. Resolved, upon the question, that
" the said petition be admitted to be received; as if the same
" had been delivered in due time." Journ. vol. viii. p. 394.
col.

Note
(O.)

col. 2. It is to be observed on this entry, that at that time petitions complaining of undue elections were presented directly to the Committee. The practice of presenting them to the House was introduced afterwards in the same reign.

[84]

11 Jan. 1747 $\frac{7}{8}$. On occasion of two petitions, one of Frazer Honeywood, Esq. and the other of certain inhabitants of Shaftesbury, complaining of an undue election for that place, it appeared, that the return had been delivered into the office of the clerk of the crown, on the 14th of Dec. preceding, and the House had adjourned from 19 Dec. to 11 Jan. The entry of the 24th of March 166 $\frac{1}{2}$, being read, "Ordered, That the said petitions now offered to be presented to the House, be admitted to be received, the same not being presented in due time, because of the last adjournment of the House." Vol. xxv. p. 474. col. 2.

19 Jan. 1762. In the famous case of Durham (which gave rise to the statute of 3 George III. cap. 15. against occasional freemen) the return had been delivered 26 Dec. 1761. The House had adjourned from 23 Dec. to 19 Jan. 1762. The petitions were offered to be presented that day, and the entry of 17 Jan. 1747 $\frac{7}{8}$ being read, a similar order was made as in that case. Vol. xxix. p. 105, col. 1. The Journals, in both the last cases, recite, that the House had been informed that the petitioners would have petitioned the House within the fortnight, if the House had not been adjourned.

When the House is not adjourned, they are very strict with regard to the limitation. Last winter, a petition complaining of an undue election and return for the district of Elgin, Banff, Cullen, Kintore, and Inverury, was delivered to the clerk of the House, on the evening of the day on which the fortnight expired; but, after the House was up: and though there were very particular circumstances in the case, which seemed to call for a dispensation with the rule, it was determined

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determined that the petition should not be received. Votes, 20 Dec. 1774, p. 104, 105. 23 Dec. p. 112.

Note
(O.)

P. 47. (P.) This resolution was first made 16 Jan. 173 $\frac{1}{2}$, on the same day with the standing order for restraining counsel from offering evidence against the last determination of the House on the right of election, (*vide* Case of Milborne Port), since which time it has been continued every session.

Note
(P.)

P. 49. (Q.) That order appears first 26 April, 1660. Journ. vol. viii. p. 2. col. 1.

Note
(Q.)

P. 56. (R.) 25 Nov. 1695. It is ordered, "That it be an instruction to the Committee of privileges and elections, that they do admit but two counsel of a side in any cause to be heard before them." Journ. vol. ii. p. 336. col. i. The same order was renewed at the beginning of every session, till 3 Jan. 170 $\frac{1}{2}$, when it was made a standing order, and still continues to be so. Journ. vol. xii. p. 648. col. 1.

Note
(R.)

P. 57. (S.) As this separation of interests may sometimes be a mere stratagem, in order to gain an opportunity of striking off two for one from the 49, the House must be satisfied that there is a real difference in the cases, before they will allow of it. On this account it was refused in the Case of Shaftesbury, and the House divided upon it in that of St. Ives. Indeed the two sitting members may waive the privilege of striking off separately, as was done by Mr. Drummond in the last mentioned case. Perhaps, the best rule for the House to follow, in cases where the sitting members desire to separate their interests, and to appear by separate counsel, would be to trust to the candour of the counsel themselves; for it is easy to see, that there can hardly be a case where it may

Note
(S.)

[86]

not,

Note
(S.)

[87]

not, in the event, for any thing the House can know, become necessary for the two sitting members to distinguish their cases in the course of the cause, and even become adverse to each other. Thus, where there is a charge of bribery, although the two sitting members perhaps canvassed together, and, in public, acted in concert, yet one of them may have been guilty of bribery, without the concurrence or privity of the other, who, therefore, will have a distinct interest, and, on that account, will be entitled to a separate defence, and separate counsel. In like manner, when the question turns upon the majority of legal votes, if there is but one petitioner, and he should clearly make out a majority over both the sitting members, or if there be two petitioners, and one of them prove that he had a majority over all the other candidates, and the other petitioner appear to have had fewer legal votes than either of the other three, in both these cases, the remaining seat must be contested between the two sitting members, and their interests must become opposite and hostile. It was on this last ground, that the sitting members, in the case of Dorchester, were, on the suggestion of the counsel, admitted to appear as distinct parties. Indeed, there is an advantage in permitting the sitting members to discriminate their cases, which will, perhaps, in time, lead the House to be very indulgent in that respect; for, by that means, the nominees will not be appointed by the parties, which many think a defect in the constitution of these committees, on account of the supposed partiality, and the almost unavoidable bias, which men of the greatest integrity are liable to, in favour of the party by whom they are nominated.

The disadvantage of allowing a separation of cases and distinct counsel are, first, as was stated already, that this may be but an artful pretext to procure the means of a double negative in striking the Committee; and secondly, because by this means the cause is protracted, and the expence enhanced.

hanced. Of the expence, however, the parties are to judge; besides the House might, if they chose, limit each party to one counsel, and might also obviate the first objection by making it a previous condition, that the parties should wave their right of striking off two for one.

Note
(S.)

P. 63. (T.) The directions of the statute concerning the clearing of the court are only permissive, not obligatory. § 27. And, in the Committee for Pontefract, one of the members proposed, that they should deliver their sentiments in open court, according to the practice in the ordinary courts of justice. However this was not agreed to, and the custom of clearing the court has hitherto been uniformly followed.

Note
(T.)

[88]

P. 63. (U.) It was the general practice in the old Committee of elections, and at the Bar of the House, when the right of election was in dispute, to separate that question from the rest of the cause, and determine upon it first. See the Journals, *passim*.

Note
(U.)

P. 65. (V.) Ever since the 3d of Jan. 170 $\frac{1}{2}$, the following resolution has been renewed at the beginning of every session. Journ. vol. xiii. p. 648. col. 1.

Note
(V.)

Resolved. "That if it appear, that any person hath given false evidence, in any case, before this House, or any Committee thereof, this House will proceed with the utmost severity against such offender."

This resolution scarcely extends to prevarication, or misbehaviour; but in several cases the House has punished persons guilty of those offences before a Committee, with imprisonment, upon the report of the chairman of the Committee. "On the 11 of May, 1772, Mr. Bacon reports from the select Committee to whom the petition of George Preicott, Esq. complaining of an undue election
" and

Note
(V.)

[89]

“ and return for the borough of Milborne Port, in the
 “ county of Somerset, is referred, that he was directed by
 “ the Committee to acquaint the House that Mary Hoffs,
 “ being called as a witness before the said Committee, has
 “ greatly prevaricated and otherwise misbehaved, in giving
 “ her evidence.—The House was moved, that an act
 “ made in the tenth year of his present majesty’s reign, in-
 “ titled, “An act to regulate the trial of controverted elec-
 “ tions, or returns of members to serve in parliament,”
 “ might be read. And the same was read accordingly.—The
 “ House was also moved, that the entries in the Journal of
 “ the House of the 14th day of April 1746, of the pro-
 “ ceedings of the House in relation to Edmund Jones,
 “ might be read.—And the same was read accordingly.—
 “ The House was also moved, that the entries in the Jour-
 “ nal of the House of the 19th day of May, 1733, of the pro-
 “ ceedings of the House in relation to Caleb Leigh might be
 “ read.—And the same being read accordingly—Ordered,
 “ *nemine contradicente*, That the said Mary Hoffs, having
 “ grossly prevaricated, and otherwise misbehaved, in giving
 “ her evidence before the Select Committee appointed to
 “ hear and determine the matter of the petition of Geo.
 “ Prescott, Esq. complaining of an undue election and re-
 “ turn for the borough of Milborne Port in the county of
 “ Somerset, be, for her said offence, taken into the custody
 “ of the serjeant at arms, attending this House.” Journ.
 vol. xxxiii. p. 746. col. 2.

[[90]] This case of Milborne Port, was the third that was tried
 by the new judicature.

In the two cases of 1746, (Journ. vol. xxvi. p. 124. col.
 2.) and of 1733. (Journ. vol. xxii. p. 157. col. 2.) the
 reports of the chairman of the Committees (which were not
 Committees of Elections) as well as the order of the House
 upon them, were in the same terms as in the case of 1772.

In all three, the order was made immediately in con-
 sequence

sequence of the report of the Committee, without hearing the party.

Note
(V.)

P. 65. (W.) The present mode of altering or amending returns, is this: The clerk of the crown is ordered to attend with the return, and, in the House, amends it, by erasing the name of the person, or persons, whom the House have determined not to have been duly elected, and inserting that of those who ought to have been returned, in their place. If there be two returns, and one of them is determined to be void, he takes that off the file, leaving the other; and, if that other contain the names of the person or persons determined not to have been duly elected, it is amended in the manner just described. It is possible for the same return to undergo two amendments, when there are two questions, one upon the legality of the return, and the other on the merits of the election, and they are separately determined at different times. Thus in the case of Morpeth, though the return has been altered by erasing the name of Mr. Eyre, and inserting that of Mr. Byron, if, when the merits of the election come to be tried, it should appear to the Committee, that Mr. Eyre had the majority of legal votes, and was duly elected, his name will come to be inserted again in the place of Mr. Byron's.

Note
(W.)

[91]

The practice was not always as it is now. In very ancient times the method seems to have been to send a new writ to the sheriff, to enquire who had been elected, and if others than those who had been returned should appear to have had the majority of voices, to make a return of them into *Chancery*. See the case of Lancashire, an. 1362, in Prynne's Brev. Parl. Part I. p. 259. In 1592, the Speaker said, "No return can be amended in this House; for the writ, and the return are in Chancery, and must be amended there." This doctrine was founded on the same principle with the claim of the Chancellor to determine the legality of returns, and met with the same fate. In the case of

Note
(W)

[92]

Chippenham, an. 1624 (which is reported in Glanville though the circumstance here taken notice of is not mentioned) there was a double return, one of Mr. *Charles* Maynard, and Mr. Pym, the other of Mr. *Charles* Maynard, and Sir Francis Popham. The House divided in favour of the latter return. There was no question about the validity of Maynard's election; but his name was mistaken in the proper return, his real name being *John* Maynard. This was to be amended, and it was resolved, "That the bailiff should do it, and not the clerk of the crown, and that the return should be sent down to the bailiff in the count try for that purpose." [Journ. vol. I. p. 686. col. 2.] In like manner, in the case of Leicestershire, 12 Feb. 1629, the sheriff, not the clerk of the crown, was ordered to alter the return. *Vide infra*, Case of New Radnor, (Note D).

The course came soon to be, for the returning officer to be ordered to attend the House together with the clerk of the crown, when the return was to be amended, and the returning officer to make the amendment. If the returning officer neglected to attend, it was done by the clerk of the crown. Case of Abingdon, 23 May, 1660, Journ. vol. viii. p. 42. col. 1, 2. If there were two returns for the same place annexed to the writ, and one of them was determined to be good, the clerk of the crown, only, attended in such case, to take the void return off the file.

Returns continued to be amended by the returning officers, till near the end of the last century. There seems to have been two reasons for this: one, jealousy of the court of Chancery, and its officers; the other, that, as there was often some blame lay on the returning officer when the persons not duly elected were returned, he was deemed the proper person to be the instrument of amending his own error; there was a degree of humiliation and punishment in doing this publicly in the House, and, by this means, he was in the way, if it should be thought proper to impose
any

any more severe punishment upon him. See the case of Chichester, 21 May, 1660, vol. viii. p. 40, col. 2.

Note
(W.)

Towards the beginning of King William's reign, the present method of having the return in all cases amended by the clerk of the crown, was adopted. The claims of the Chancellor were then at an end, and if it was necessary to censure or punish a returning officer, the House ordered his attendance for that special purpose.

THE HISTORY OF THE

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IN TWO VOLUMES
THE SECOND VOLUME
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I.

THE

C A S E

Of the BOROUGH of

MILBORNE PORT,

In the County of SOMERSET.

The Committee for trying this cause was chosen on Friday, the 20th of January, 1775, and consisted of the following Gentlemen :

Frederick Montagu, Esq. Chairman,		Higham Ferrers
Sir George Savile, Bart.	-	Yorkshire
Hon. Thomas Walpole,	-	King's Lynn
John Orde, Esq.	-	Midhurst
Lord John Cavendish,	-	York
Joseph Martin, Esq.	-	Tewkesbury
Paule Fielde, Esq.	-	Hertford
Mr. Alderman Hayley,	-	London
William Henry Lyttelton, Esq.	-	Bewdley
Sir Watkin Williams Wynne, Bart.	-	Derbighshire
James Grenville, jun. Esq.	-	Buckingham
Richard Grenville, Esq.	-	Buckingham
Thomas Whitmore, Esq.	-	Bridgenorth

Members for

NOMINEES.

Of Walter and Browne :

Beaumont Hotham, Esq. - - Wigan

Of Luttrell and Wolfeley :

Robert Gregory, Esq. - - - Rochester

PETITIONERS.

Edward Walter, Esq. and Isaac Hawkins Browne, Esq.
The Hon. Temple Luttrell, and Charles Wolfeley, Esq.
Certain Inhabitants of the Town and Borough of Milborne Port, (in the interest of Luttrell and Wolfeley.)

COUNSEL.

For Walter and Browne :

Mr. Lee, Mr. Hobhouse.

For Luttrell and Wolfeley :

Mr. Mansfield, Mr. Hotchkin.

THE
C A S E
Of the BOROUGH of
MILBORNE PORT.

ON Saturday, the 21st of January, the Committee met, and the three petitions being first read, it appeared that there were, in this case, three returns, made by different persons claiming to be returning officers, all of which had been annexed to the writ by the sheriff, and returned into the office of the clerk of the crown. By one, Walter and Browne; by the other two, Luttrell and Wolfeley were returned.

The petitions likewise contained a claim by each party of the majority of legal votes; and mutual allegations of bribery. In the petition of Walter and Browne, it was also alledged, that Luttrell, at the time of his election and return, had, “ by him-
“ self, or some person in trust for him, an office,
“ place, or employment, touching or concerning
“ the farming, collecting, or managing his Ma-
“ jesty’s

[98]

“ jesty’s customs,” whereby he was incapable of being elected (1).

The last determination of the House, on the right of election, was then read, which is as follows:

8 Dec. 1702. Resolved, “ That the right of election of burgesſies, to ſerve in Parliament for the borough of Milborne Port, in the county of Somerſet, is only in the capital bailiffs, and their deputies, in the commonalty ſtewards, and inhabitants thereof paying ſcot and lot (2).”

Then, as there were different perſons claiming to be returning officers, the following reſolution of the Houſe was read:

[99] 2 Dec. 1747, Reſolved, “ That the execution of the precept for electing burgeſſes for the borough of Milborne Port, in the county of Somerſet, and the making the return thereof, are only in the two ſub-bailiffs of the ſaid borough, or in one ſub-bailiff if there are not two (3).”

After this the ſtanding order of 16 Jan. 173 $\frac{5}{6}$ was read, viz.

Ordered, “ That the counſel at the bar of this Houſe, or before the Committee of privileges and elections, be reſtrained from offering any evidence touching the legality of votes, for members to ſerve in Parliament for any county,

(1) Votes, 6 Dec. 1774, p. 13, 14, 15, 16, 17.

(3) Journ. vol. xxv. p. 458, col. 1.

(2) Journ. vol. xiv. p. 75.

“shire, borough, cinque-port or place, contrary
 “to the last determination in the House of Com-
 “mons, which determination, by an act passed in
 “the second year of his Majesty’s reign, intituled,
 “An act for the more effectual preventing bribery
 “and corruption in the election of members to
 “serve in Parliament,” is made final to all intents [100]
 “and purposes whatsoever, any usage to the con-
 “trary notwithstanding (1).”

It being agreed to proceed first upon the legality of the different returns, separately from the other questions, and the return of Walter and Browne being *immediately* annexed to the precept, their counsel began, in consequence of the following standing order :

18 March, 1727 $\frac{7}{8}$, Ordered, “That, in all cases
 “on double returns, where the same shall be con-
 “troverted, either at the bar of this House, or in
 “Committees of privileges and elections, the
 “counsel for such person who shall be first named
 “in such double return, or whose return shall be
 “*immediately* annexed to the writ or precept, shall
 “proceed in the first place (2).”

The

(1) Journ. vol. xxii. p. 498, Lud. 73. In those two cases
 col. 2. *both* the candidates were stated

(2) Journ. vol. xxi. p. 89, in the return to have been *duly*
 col. 1. *elected*. But, in the case of

[Vide *infra*. 1st. case of Colchester, which came on to
 Cricklade, and the concluding be tried 27 March, 1789, the
 note to that case, and also the return stated specially that *Jack-*
 case of Mitchel in 1784, 1 *son* and *Tierney* were candidates,
 and

[101] The constitution of the borough of Milborne Port is this: It consists of nine bailiwicks, of which part are the property of Thomas Hutchins Medlycot, Esq. and part of Mr. Walter. Of the nine capital bailiffs for those bailiwicks, there are two who are called *thereigning* bailiffs for the year, and they preside in the borough, and are the head-officers for that year; those of the different bailiwicks being *reigning* bailiffs in their turns, according to a certain known rotation. Each of the reigning bailiffs appoints a sub-bailiff for the year, and the two sub-bailiffs, according to the resolution of 1747 (1), are the returning officers for that year.

Mr. Medlycot's property and that of Mr. Walter are so intermixed, that, in following the established rotation, in some years one of the reigning bailiffs is in the appointment of Medlycot, and the other in the appointment of Walter; in some years they are both appointed by Medlycot, and in others, both by Walter.

In 1773, one of them was appointed by Medlycot, and he nominated one Elias Oliver to be his sub-bailiff; and the other by Walter, who nominated one Robert Baunton to be his sub-bailiff.

and that each had 640 votes at the close of the poll, but did not say, that either was duly elected; Jackson's name stood *first* in the return. The Committee held this return not to be within the order, and then decided, on arguments drawn from the allegations of the petitions on both sides, that Tierney's counsel should begin.]

(1) *Supra.* p. 99.

In

In 1774, it was Mr. Medlycot's turn to appoint both the reigning bailiffs.

A witness (one John Ames) swore, that, in October 1773, Medlycot said to him, that, as both the returning officers would be his own the next year, if the gentlemen *he should* nominate at the poll should have but a dozen good votes, they should be returned. To affect the credibility of this witness, his own brother was produced, who swore that he had told him, that Mr. Walter said, he would get him a place, and make a man of him. John Ames, on his cross examination, had previously denied that ever Walter made him any promise to that effect.

The sub-bailiffs have always been appointed at a court-leet after Michaelmas-day, holden by a steward named by the former sub-bailiffs. Since the interests have been divided, there have been two stewards who have holden separate courts, but always on the same day.

There is a fair at Sherborne, in Dorsetshire, called Pack-Monday fair, being kept on the first Monday after Michaelmas-day, which is called Pack Monday. [103]

It appeared, by the witnesses, that the court-leet for appointing sub-bailiffs, had always been holden, before and since the style was altered, on the first Tuesday after Pack-Monday fair, and that there were entries to this purpose in the minute-book of the steward of the court.

The

The witnesses swore (one of them, William Burgler, being 62 years of age) that they had always understood that the court was regulated by the fair, and the court-day was called Pack-Tuesday. But in none of the court-books or rolls, was there any entry referring the holding of the court to the Tuesday after Sherborne fair. It only appeared to have been always holden on the first Tuesday of October, before the change of the style took place.

[104] On the third of October 1774, the precept for the election was delivered to Robert Baunton, who gave his receipt for it; and, having communicated with the other sub-bailiff (Oliver), they concurred in appointing the day of election to be on the tenth.

On examining the precept, it appeared that, in the direction to the "*sub-bailiffs*," the (*s*) had been effaced, to make it "*sub-bailiff*;" but there was no evidence that any fraud was intended by this.

On the 4th (being the first Tuesday in October, N. S.) Oliver, together with Medlycot and others, broke open the Town-hall, the person who had the key not being found, and Mr. Medlycot having nominated his brother, the Rev. George Hutchins, and Robert Curtis, to be the reigning capital bailiffs for the year ensuing, they came into the court-leet (which was opened according to form) and appointed John Newton, jun. and John Peckham to be their sub-bailiffs.

The

The reigning bailiffs, and the sub-bailiffs enter on their offices immediately after their appointment.

At the same court, Oliver was appointed a constable, by the jury, and sworn into that office.

On the tenth, the election came on, and there [105] were three polls taken. One by Baunton, who declared the majority of legal votes to be in favour of Walter and Browne; and accordingly annexed a return of them to the precept; one by Oliver; and a third by Newton and Peckham. By each of the two last, Luttrell and Wolfeley had the majority of votes, and accordingly, there were two returns made of them. Counter-parts of all the three were executed by the under Sheriff, and they were all annexed to the writ.

If Newton and Peckham were the legal sub-bailiffs at the time of the election, their return only was valid.—If they were not, it was void; and, in such case, the question would be, whether the return of Baunton, or of Oliver, was the legal return, or whether they were both void.

If the court-leet, holden on the fourth of October, was the legal court for the appointment of the annual sub-bailiffs, Newton and Peckham were the legal sub-bailiffs and returning officers on the tenth.

The question concerning the legality of the court-leet turned chiefly upon the statute for altering the style (1). [106]

(1) 24 Geo. II. cap. 23, anno 1751.

By the first section of that statute, it is enacted,
 “ That the fixed terms of Hilary and Michaelmas
 “ in England, the courts of great sessions in the
 “ counties palatine, and in Wales, the courts of
 “ general quarter sessions and general sessions of
 “ the peace, *and all other courts of what nature or*
 “ *kind soever*, whether civil, criminal, or ecclesiasti-
 “ cal, and all meetings and assemblies of any bodies
 “ politic or corporate, either for the election of
 “ any officers or members thereof, or for any such
 “ officers entering upon the execution of their re-
 “ spective offices, or for any other purpose what-
 “ soever, which by any law, statute, charter, *custom*
 “ or *usage*, within this kingdom, or any other
 “ dominion of the crown of Great Britain, are to
 “ be holden and kept on any fixed or certain day
 “ of any month, or on any day depending on the
 “ beginning, or any certain day of any month
 [107] “ (*except such courts as are usually holden or kept with*
 “ *any fairs or marts*) shall from time to time be
 “ holden and kept upon, or according to the same
 “ respective *nominal* days and times whereon, or
 “ according to which, the same were to be
 “ holden before this act, but which shall be com-
 “ puted according to the said new method of
 “ numbering and reckoning the days of the kalen-
 “ dar, that is to say, *eleven days sooner than the re-*
 “ *spective days whereon the same were then holden or*
 “ *kept.*”

By the fourth section of the same statute it is enacted :

“ That

“ That the holding and keeping of *all markets,*
 “ *fairs, and marts,* which are either fixed to certain
 “ *nominal* days of the month, or depending on the
 “ beginning, or any certain day of any month,
 “ *and all courts incident to, or belonging to, or usually*
 “ *holden or kept with, any such fairs or marts,* fixed
 “ to such certain times as aforesaid, shall not be
 “ continued upon the same *nominal* days of the
 “ month, or according to such *nominal* days, but
 “ upon, or according to the same *natural* days, [108]
 “ upon or according to which they should have
 “ been holden in case this act had not been made,
 “ that is to say, eleven days later than the same
 “ would have happened according to the *nominal*
 “ days of the new supputation of time.”

The counsel for Walter and Browne contended,
 That the court in question, was *a court usually*
holden with a fair, and therefore within the excep-
 tion of section 1, and the provision of section 4,
 and to be holden on the same *natural* day as for-
 merly; i. e. according to the old style. That this
 was evident from the constant practice since the
 change of the style, and the general sense of the
 place, and from the steward's book.

That if it were not so, yet the holding it last
 year according to the new style, for the first time,
 immediately on the eve of the election, contrary
 to the usage ever since the statute of the 24 of
 Geo. II. without any notice being given of such
 an intended innovation, till the precept for the [109]
 election came to the borough, coupled with the
 declaration

declaration of Medlycot, which had been proved by one of the witnesses (1), shewed that the intention of holding it then was occasional, and evidently only taken up on account of the dissolution of the parliament, which brought on the election before Mr. Medlycot's two sub-bailiffs could have come into office, if he had waited till the usual time; consequently, that, on this ground, the appointment of Newton and Peckham was fraudulent and void.

That, if they were legally appointed, still the former sub-bailiffs, being the returning officers at the time when the precept was delivered, and one of them having received, and given his receipt for it, they were the only persons competent to make the return, according to the 7th and 8th of Will. III. cap. 25. § 1. (A.) But—

[110] That, if the question came to be between the returns made by Baunton and Oliver, it was clear that Oliver, by accepting the office of constable, at the court-leet holden on the 4th of October, had abdicated his former office, and could not afterwards pretend to exercise it. That the principles of a much more remarkable instance of abdication were in every respect applicable to this case. That Baunton, therefore, was the only sub-bailiff in the borough at the time of the election, and the power of making the return solely in him, according to the resolution of the House of 1747 (2), in the same manner as if Oliver had been dead, or had left the place.

(1) *Supra*, p. 102.

(2) *Supra*, p. 99.

The Counsel for Luttrell and Wolfeley argued,

That though it did appear that the Michaelmas court-leet had usually been holden on the Tuesday after Sherborne or Pack-Monday fair, yet *that* was merely *accidental*, because it happens that the first Tuesday in October must of necessity be the day immediately following the first Monday after Michaelmas. That the entries, in the minute or memorandum-book of the steward, prove only [111] that he assisted his memory in recollecting the time of holding the court, by referring it to Pack-Monday. That it was natural, from this *accidental* connection between the two days, for the people of Milnborne Port to call the court-day Pack-Tuesday. That if they had any *necessary* connection, it would have appeared by entries in the court-books in some such terms as these, “ *At a court holden on the first Tuesday after Pack-Monday, or Sherborne fair;*” but that no such entry is to be found. That there can be no reasonable dependency or relation between a court-leet holden at Milborne Port, in the county of Somerset, and a fair holden at three miles distance, in the county of Dorset. That if the lord of the manor were to forfeit that fair, it would be absurd to suppose, that this should work a forfeiture of the court-leet, yet *that* must be the consequence, if the only legal computation of the day for holding it, must be taken from the day on which the fair is kept. That it is evident that the exception of section 1, and the provision of section 4, of the statute, only mean [112]

courts of pie-powder, or other courts of that sort, necessarily depending on fairs.

That, as to the supposed occasionality of the court for appointing Newton and Peckham, there was no foundation for such an objection. That the Committee would not give any credit to the testimony of John Ames; and, if the statute of Geo. II. had been hitherto misunderstood at Milborne Port, it was proper to set right the error as soon as it was discovered; and that it had never been the custom to give any previous notice of the holding of the court.

(This was proved by the witnesses. It only appeared that a common warrant used to be sent to the bailiff to summon a jury.)

[113] That it could never be the meaning of the statute of the 7th and 8th Will. III. if the precept was delivered to the returning officer of any borough, and he should go out of office, and another be appointed legally, between that and the time of the election, that the new officer should not execute the precept. That he is, in the eye of the law, the same officer with the former, and the statute only meant, in order to prevent litigation and delay at an election, to fix who was to execute the precept, when there should be different persons claiming to be returning officers at the same time, under different titles. That, since the statute of Will. III. there have been many instances of precepts received by one returning officer, and executed by his successor, and the legality of such execution

execution has never been disputed, even when the election has been controverted. (B.)

That it did not appear, that the office of constable and that of sub-bailiff are incompatible.

(☞ The witnesses only swore, that they had never known any instance of the same person holding both at the same time.)

But that if they are, still if the court was illegal, the appointment of Oliver to be constable was equally void with the appointment of the two [114] new sub-bailiffs, and, therefore, such void appointment did not divest him of his office of sub-bailiff.

That Oliver did not abdicate that office; he only acted as one doubtful of the law, concerning the legal time of holding the court; and, in the uncertainty of this point, continued in the exercise of his former office, by taking the poll at the election. That when the jury had chosen him constable, if he had refused to be sworn, he was liable to be indicted, fined, or amerced. That Oliver, therefore, if Newton and Peckham were not legally appointed, was as much a returning officer as Baunton was. That he joined in the notice for the election with Baunton, took a poll, and made a return. His return, therefore, was equally valid with that of Baunton.

The counsel for Walter and Browne, in reply, insisted,

That there was nothing absurd in supposing an original connection between Sherborne fair, and the court-leet at Milborne Port, although the two places are situated in different counties. That, in [115] former

former times, the grants of the crown used to extend very commonly into different counties, and the fair and court at first might have made part of the same grant.

That it is not true, that if a fair were forfeited, a court *usually holden with it*, but belonging to another person, would be so likewise. That the forfeiture of one person could not affect the right and property of another. That the old prescriptive day for holding the fair would still continue to be the guide for fixing the prescriptive day for the court-leet. That prescriptive rights are of too high a nature to be lost by the alteration of a subject with which they are collaterally connected. That this is proved by the following instance; there is a statute of Hen. VI. (1) which enacts, that all fairs and markets holden on certain feasts, or on Sundays, shall cease, on pain of forfeiture of the goods exposed to sale, to the lord of the franchise, or liberty, yet long afterwards, in the reign of queen Elizabeth, it was determined, that [116] a man, in pleading, might prescribe to a fair to be holden on a Sunday (2). (C.)

But that, if the court in question should not be considered, by the Committee, to be within the meaning of the fourth section of the statute of Geo. II. yet it could not be brought within the provision of the first section, for, by that section, the new days for holding the courts there mentioned, must be ele-

(1) 27 Hen. VI. cap. 5. § 1.

(2) Cro. Eliz. p. 485. Comyns v. Boyer.

ven days sooner than the former days, on which they used to be holden, and the first Tuesday of October, new style, will sometimes be more, and sometimes less, than eleven days sooner than the first Tuesday of the same month, old style: That, for instance, in the last year, 1774, the first Tuesday of October, new style, was the fourth day of the month, new style, and the first Tuesday, old style, was the eighteenth of the month, new style; that is, at a fortnight's interval. That the court-leet, therefore, at which Newton and Peckham were appointed, was a fortnight sooner than the day on which it would have been holden, if there had been no change of the style, and, consequently, not according to the provision of the statute. That, at most, this was a *casus omissus*, not provided for by the statute, and the court must be holden on the old prescriptive day, without any reference to the alteration of the style. (D). [117]

That, as to Oliver's return, it was undoubtedly bad; and, if the Committee were to put that of Baunton on the same footing with it, they must hold them to be both void.

The Committee having cleared the court, deliberated among themselves; and the counsel being again called in, the Chairman acquainted them, that the Committee had resolved,

“ That the return made by John Newton, jun.
 “ and John Peckham, of Mr. Luttrell and Mr.
 “ Wolseley, was an illegal return.

“ And that the other two returns appeared to
 “ the Committee to be so complicated together,
 “ that they thought it their duty to go upon the
 “ merits of the election, without previously decid-
 “ ing between them.”

[118] The counsel for Walter and Browne now went
 into the whole that remained of their case, viz.

The majority of legal votes.

The bribery by Luttrell and Wolfeley, or their
 agents (1) :

And, Luttrell's ineligibility.

The numbers on Baunton's poll stood as fol-
 lows :

For Walter and Browne	- - - -	62
For Luttrell and Wolfeley	- - - -	58
Majority for Walter and Browne	- -	<u>4</u>

On Oliver's poll, the numbers were ;

For Luttrell and Wolfeley	- - - -	86
For Walter and Browne	- - - -	37
Majority for Luttrell and Wolfeley	-	<u>49</u>

They proposed to add 5 to Walter and Browne's
 vote's on Baunton's poll :

And to take off 11 (2) from the votes for Lut-
 trell and Wolfeley.

(1) *Vide infra*, Case of St. Ives, Note (B). stated to be 10, but then the
 numbers on the two corrected

(2) In the minutes this is polls would not correspond.

The

The numbers then would stand thus,

For Walter and Browne	-	-	-	-	67
For Luttrell and Wolfeley	-	-	-	-	<u>47</u>
Majority for Walter and Browne	-	-	-	-	<u>20</u>

In like manner, they proposed to add 30 for Walter and Browne on Oliver's poll;

And to take off 39 from the votes for Luttrell and Wolfeley. The numbers then would correspond with the other poll.

They contended, that there are *nine* commonalty stewards, who are entitled to vote under the last determination of the House.

The other voters rejected by Oliver, and which they meant to re-establish, had been refused as fraudulent inhabitants, or fraudulently rated.

And the votes for Luttrell and Wolfeley whom they meant to strike off from both polls, were objected to on the same grounds.

They also objected to one of Luttrell and Wolfeley's voters as lying under a conviction of felony.

Having gone through their evidence concerning the votes which they meant to add to, or strike off from, the two polls, they proceeded to produce evidence on the head of bribery; and to shew that Luttrell held a disqualifying office. When they had finished, and summed up their evidence; [120]

The counsel on the other side went first upon their objections to the voters claiming as commonalty stewards.

They next objected to 23 votes received by Baunton for Walter and Browne, 5 of which were also admitted by Oliver.

Then they endeavoured to support the votes which had been objected to on the other side.

☞ In order to make the numbers on the two polls correspond, after their proposed alterations, we must suppose that they allowed 7 of the votes for Walter and Browne on Baunton's poll, which were not admitted by Oliver. If so, by their calculation, the numbers ought to have been,

[121]	For Luttrell and Wolfeley	- - - -	86
	For Walter and Browne	- - - -	<u>39</u>
	Majority for Luttrell and Wolfeley	-	<u>47</u>

After this, they proceeded to remove the imputation of bribery from Luttrell and Wolfeley, and to fix bribery on the other two candidates.

Lastly, they answered the objections to Luttrell's eligibility; and after they had summed up their case,

The counsel on the other side replied.

On the question concerning the commonalty stewards, the facts, and the arguments on both sides, were as follows:

On the part of Walter and Browne, a book was produced, by the Rev. Mr. John Taylor, curate of Milborne Port, and one of the commonalty stewards, containing the accounts of the commonalty stewards concerning the management of their estates, their rents, disbursements, and the elections

elections to fill up vacancies. The book commenced in 1762. He knew of no other book of a prior date. By several entries in this book, it appeared, that there were *nine* persons described as commonalty stewards. That when one died, or resigned, another was elected in his stead, and the entry of the election signed, sometimes by five, sometimes by seven persons, styling themselves *stewards*. The two who are appointed annually, are in this book denominated *presiding stewards*. The whole are, sometimes called the *Homage*, and seven of them *Assistants*, in contradiction to the two presiding stewards. [122]

By the Journals, 8 Dec. 1702, in the case when the last determination of the House was made, it appears, that one party contended, that the right of election was "In the inhabitants paying a yearly rent to the queen-dowager, and not receiving alms," and, that the other alledged, that it was "In the *nine* capital bailiffs, their two deputies, in the *nine* commonalty stewards, and "in the inhabitants paying scot and lot."—The former does not seem to have denied the number of commonalty stewards to be nine, or to have given any evidence to contradict it. [123]

William Burgler, aged 62, who had lived the principal part of that time at Milborne Port, and John Noakes, aged 61, who had been born, and had always lived there, swore that they always understood that the nine had a right of voting, and had voted; and the former said they voted whether

ther they were inhabitants or not. That, when the two sub-bailiffs were in different interests, he had known them rejected by one of them, but never by both the sub-bailiffs.

[124] On the other side, they read the entry in the Journals of 14 March 164⁸/₇, containing the report of the Committee of privileges and elections, on the controverted election between Medlycot and French, by which it appears, that some of the seven claiming to be commonalty stewards, and to vote, having been rejected, and Mr. French, in whose interest they were, having petitioned, the old books were examined, and, it appearing, that they were there denominated the *Assistants*, or *the Homage*, parole evidence was offered to prove them commonalty stewards, but was rejected by the Committee (1.)

They then produced two returns, one of 1681, the other of 1695, to each of which there were the names of two persons designed as commonalty stewards, and *only* two; and also certain leases granted by the two, called, by them, the only commonalty stewards, without the concurrence of the other seven.

The counsel for Walter and Browne argued thus:

It is very clear, from the state of the case in 1702, as it has been cited from the Journals, that the House must have referred to the number of commonalty stewards stated by the one party, and

(1) Journ. vol. xxv. p. 790. col. 1.

not controverted by the other, in the determination of the right of election; for, the right being alledged to be in *nine* capital bailiffs, and in *nine* commonalty stewards, &c. the House decided it to be, in the capital bailiffs, and in the commonalty stewards, &c. without defining the number of [125] either. Those general words are allowed to relate to the number of nine capital bailiffs; why should they not also, in the case of the commonalty stewards, relate to the same specified number?

The general reputation in the place, and the entries in the book produced by Mr. Taylor, prove, that all the *nine* are equally entitled to vote as commonalty stewards.

On the other side, they relied on the evidence they had produced.—They said:

It is pretty evident that the book, beginning in 1762, has been contrived on purpose to establish the right of *all* the nine, and there is no other way of accounting for the loss of all the books antecedent to that date, but by supposing them secreted or destroyed, that they might not be evidence against it.

On the question of the rates, it appeared, that, ever since the year 1772, there had been great struggles, between Mr. Medlycot and Mr. Walter, about the appointment of overseers of the poor. Several of the appointments had been quashed by [126] the court of King's Bench, and two, of two sets of overseers, which had been made by the different parties

parties at the same time, viz. Easter 1774, were then before that court.

(~~It~~ They were afterwards quashed, 28 January, 1775, pending the sitting of this Committee.)

Upon these facts, the Committee proposed, that the following question should be argued by the counsel, viz.

“ Whether persons *rateable*, and having paid to the rate, though that rate were made and collected by officers illegal, or doubtful, may vote as inhabitants paying scot and lot.”

The counsel for Walter and Browne contended that they may,

[127] They said, that scot and lot existed long before overseers of the poor, or poor-rates were known to the law of England, (which is only since the statute (1) of the 43d year of Queen Elizabeth); and for this they appealed to the definitions in Spelman's Glossary (2). That the description therefore of persons paying scot and lot could not depend on the regular appointment of officers according to the rules laid down by that statute. That the poor-rate indeed was in common cases very properly taken to be the rule for discovering who are to be considered as persons paying scot and lot; but that the right of such persons to vote is so far from being created by the poor-rate, that it is neither necessarily connected with, nor alterable by it. (E.)

(1) 43 Eliz. cap. 2.

(2) Titles Scot and Lot.

But,

But, as to rates made by illegal overseers, they argued, that the overseer is a mere instrument ; and, therefore, any *ministerial* act done by him shall not be avoided, because the title, which he had to the office, was bad. That, on this principle, admissions on surrenders, made by a lord of the manor, continue to be good, though he himself be afterwards ousted, on a defect in his title existing previous to such admissions, whereas immediate grants made by him are void. That, in like manner, admissions of burgessees, in boroughs, by illegal mayors, or aldermen, are good, where the burgessees were admitted under a precedent title, but they are void where the admissions were on election ; the mayor or aldermen acting, in the first case, merely in a ministerial capacity ; in the second, as voluntary electors. [128]

The counsel for Luttrell and Wolfeley took a distinction on the word "*doubtful*" in the question, as proposed by the Committee. If it meant to refer to instances where there had been but one rate, and one set of overseers, though, perhaps, the appointment and rate might be afterwards questioned, and set aside, there they thought the votes would be good, but not, as in the present case, where the appointment and rate were, at the time of making them, disputed, and opposed by another appointment and another rate. In such case they said they conceived, that, upon the question of the legality being judicially determined, the rate made by the illegal overseers being bad, the money would be recoverable by those who had paid under that [129]

that rate, and they would be in the same situation as if they never had been rated or had paid.

They denied, that parish officers were mere instruments acting *ministerially* in making the rates.

And they alledged, that the relation now between scot and lot, and the poor-rate is such, that, if there were no rate, there would be no scot and lot, because there would be no parish expences to be borne.

The Committee, after clearing the court, and deliberating on the question,

Resolved, That persons *rateable*, and “*having paid to the rate*, though that rate be made by officers illegal, or doubtful, have a right to vote *as inhabitants paying scot and lot.* (F.)”

And they directed the counsel to confine themselves in their evidence (concerning the particular votes objected to on this head) to their rateability, without entering into the legality of the appointment of the overseers.

[130] This point of law being decided by the Committee, the discussion of each particular vote became in a manner a distinct cause, turning merely on the matter of fact. For the reasons therefore given in the Introduction (1), I have omitted all that part of the case, as well as what concerned the bribery of the parties, or their agents, as there was no question of law on that subject. On this occasion, and in the succeeding cases when the circumstances happen to be similar, I desire to adopt the

(1) *Supra*, p. 41.

words of the Committee of privileges and elections, in the Case of Coventry, 24 Feb. 170 $\frac{1}{2}$, where they say, in their report to the House, "That the evidence relating to the disqualifying and justifying of voters being very particular, it is conceived more proper to refer to the minutes taken at the Committee, than to transcribe the same, and make a long report, which, after the determination of the election, can be of no use (1)."

With regard to the person objected to, as under a conviction of felony (one James Hiscox,) a copy of the conviction was produced by a witness, who had compared it with the original; and another swore to his identity. [131]

It was contended, on the part of Luttrell and Wolfeley, that a person in this situation may vote for a member of Parliament.

On the head of Mr. Luttrell's ineligibility, it appeared from the evidence of Mr. Charles Hartford, the person who executes the office, he was supposed to hold, as deputy, that it is the place of *Customs inwards in the Port of Bristol*. That it stands in the name of one Mr. Smith, who resides in Ireland; and the accounts are always made out in his name. He said, he paid the profits (amounting to between three and four hundred pounds a year) to Luttrell, considering him as agent for Smith. That he had seen a power of attorney from Smith to Luttrell, authorizing him to appoint a deputy for him, and that he had received a depu-

(1) Journ. vol. xvi. p. 763. col. 1.



tation from Luttrell as attorney for Smith, but that, afterwards, that deputation being found to
 [132] be improper, he had destroyed it, and had received his deputation (which was produced and read) directly from Smith. That he thought, from this transaction, that there was such a connection between Smith and Luttrell, as made it safe for him to pay the money to Luttrell; but that he had never considered whether the payments he had made to Luttrell were strictly legal, and he thought that, if Smith were to die, he would be liable to pay the arrears of the profits to his executors. He said he was appointed by Mr. Luttrell's interest.

On the part of Walter and Browne it was contended,

That Smith's holding the office was merely colourable. That Luttrell received the profits, and was, in substance, the person who possessed the office, and that he was thereby incapable of being elected since the statute of the 12th and 13th of William III. (G.) (1).

On the other side they argued,

That, supposing Mr. Luttrell to be possessed of
 [133] the office, yet he was capable of being *elected*, and if he were to resign, after the election, might *sit and vote*. That there is a clear difference between the statutes of the 12th and 13th of William III. and the 6th of Anne (2). That (G.) by the latter, persons holding the offices which are there specified, are not only declared to be incapable of *sitting*,

(1) Cap. 10. § 89, 90.

(2) Cap. 7. § 25. 29.

but of being *elected*, and, if they are elected, the election is made void; but, in the statute of William, there is no clause to make a person holding a place in the customs, incapable of being *elected*, or the election of him void. Accordingly, they said, that, in the case of Sir Richard Allin, who, having an office in the customs when he was chosen for Dunwich, had surrendered it before he took his seat, the House, 9 Feb. 170⁸/₉, resolved, that he should be admitted to take his seat (1) (H.)

But they said, it was unnecessary for them to urge this point, as no evidence had been given to shew that Mr. Luttrell had any beneficial interest in the place.

The following questions of evidence arose in the course of the cause. [134]

When John Ames was called to prove the declarations of Medlycot concerning the return (2), his evidence on that head was objected to.

It was contended, that Medlycot was not a party to the petition, and that his declarations could not affect the cause of Luttrell and Wolseley.

The other side alledged, that he was avowedly the person on whose interest they stood, and was to be considered as an agent for them.

The court was cleared, and the Committee, after deliberation,

Resolved, to admit the evidence.

(1) Journ. vol. xvi. p. 98. (2) *Supra*, p. 102.
col. 2. and p. 99. col. 1.

Mr. Medlycot was proposed to be called, to contradict the testimony of Ames, but being objected to, after argument, and clearing the court, the Committee

Resolved, that his evidence should not be received.

[135] One of the presiding commonalty stewards (the Rev. Mr. Taylor) being asked a question touching the right of the nine commonalty stewards to vote, this was objected to ;

And the question waved; he having a contingent interest to maintain their right of voting.

John Coxe Hippefley, Esq. barrister, being called on the subject of Mr. Luttrell's office, refused to answer any questions which might affect him, as he had constantly acted as his confidential adviser and counsel.

The Committee took several days to consider of the merits of this election, after the counsel had closed their evidence and arguments.

On Friday, the 10th of February, their Chairman *informed* the House, " That the Committee
" had *determined*,

" That Edward Walter, Esq. is not duly elected
" a burghers to serve in this present Parliament for
" the borough of Milborne Port in the county of
" Somerset.

[136] " That Isaac Hawkins Browne, Esq. is not duly
" elected a burghers to serve in this present Parlia-
" ment for the said borough.

" That the Hon. Temple Luttrell is duly return-
" ed

“ ed a burgeſſ, to ſerve in this preſent Parliament
 “ for the borough of Milborne Port in the county
 “ of Somerſet, *by the return executed by Elias*
 “ *Oliver.*

“ That Charles Wolfeley, Eſq. is duly returned
 “ a burgeſſ to ſerve in this preſent Parliament for
 “ the ſaid borough. by the return executed by the
 “ ſaid Elias Oliver.

“ That the Hon. Temple Luttrell is duly elected
 “ a burgeſſ to ſerve in this preſent Parliament
 “ for the borough of Milborne Port in the county
 “ of Somerſet.

“ That Charles Wolfeley, Eſq. is duly elected a
 “ burgeſſ to ſerve in this preſent Parliament for the
 “ ſaid borough of Milborne Port (I).”

The ſaid determinations were ordered to be entered in the Journals of the Houſe, and the deputy-clerk of the crown was ordered to attend immediately, with the ſeveral returns for this borough:

And to take off the file the indenture of return, [137]
 by which Edward Walter, Eſq. and Iſaac Hawkins Browne, Eſq. were returned; and alſo the indenture of return executed by John Newton and John Peckham, by which the Hon. Temple Luttrell and Charles Wolfeley, Eſq. were returned:

Which was done accordingly (1).

(1) Votes, 10 Feb. p. 204, 205.

N O T E S

ON THE CASE OF

MILBORNE PORT.

Note
(A.)

PAGE 109. (A.) 7 and 8 Will. III. cap. 25. § 1.
 “ The officer to whom the writ is sent, shall, by himself, or agent, deliver, or cause to be delivered, the precept to the proper officer of every borough, town corporate, port, or place, to whom the execution of such precept doth belong or appertain, and to no other person whatsoever, and *such* officer upon the back of the same precept, shall indorse the day of the receipt thereof, in the presence of the party from whom he received such precept, and shall forthwith cause public notice to be given of the time and place of election, and shall proceed to election thereupon, within the space of eight days next, after his receipt of the same precept, and give four days notice, at least, of the day appointed for the election.”

Note
(B.)

[139]

P. 13. (B.) I have heard of several instances where this happened, at the last general election, particularly at Sudbury; yet, when that election was brought before a Committee, though the misconduct of the officer who made the return, was one ground of the petition, it was

never contended that he was not the person who ought to have had the execution of the precept.

Note
(B.)

P. 116. (C.) Comyns v. Boyer, Croke Eliz. p. 485.—
“ The defendant in his plea, alledgeth the prescription to
“ be to hold a fair there every year upon the 29th of Au-
“ gust, and he doth not except Sunday as it ought to be.
“ But this objection was not allowed for a fair, holden
“ upon the Sunday is well enough ; although by the statute
“ (27 Hen. VI. cap. 5. § 1.) there is a penalty inflicted
“ upon the party that sells upon that day, but it makes it
“ not to be void.”

Note
(C.)

Nota. The statute absolutely says, That all manner of
“ fairs and markets, on the principal feasts therein speci-
“ fied, and Sundays, and Good Friday, *shall cease*, on pain
“ of forfeiture of the goods exposed to sale, to the lord of
“ the franchise or liberty ;” and it grants, “ That when
“ there was no other day to hold the fair, but such on
“ which it was now prohibited, it may be holden, by
“ strength of the old grant, within three days next, before
“ or after the said feasts, giving proper notice to the com-
“ mon people.” The four Sundays in harvest are excepted
from the prohibition of the statute.

P. 117. (D.) This does not seem to be conclusive. The
true meaning of the first section seems to be that, where a
court was holden *according to* a given day, before the sta-
tute, it shall now be holden *according to* another day, eleven
days sooner, i. e. *according to* the same *nominal day* as for-
merly. Thus this court being holden *according to* the first
of October, old style, *before* the act, would now be holden
according to the same *nominal day*, viz. the first of October,
new style ; that is, *according to* a day, eleven days previous
to the day *according to* which it was formerly holden.

Note
(D.)

[140]

Note
(E.)

[141]

P. 127. (E.) What it is *to pay scot and lot*, or, *to pay scot*, and *bear lot*, is no where exactly defined. There is nothing very distinct or satisfactory, in what we find in Spelman, on this subject. It only appears, from the authorities cited there, that those expressions were in use, as far back as the Conquest. It is probable that, from signifying some special municipal or parochial tax and duty, they came in time to be used, in a popular sense, to comprehend generally the burthens to which the inhabitants of a borough, or parish, as such, were liable. If the *original* signification were *that* in which those terms are used in the resolutions of the House of Commons, it is very clear that the provisions of the statute of Queen Elizabeth, could neither regulate, nor ascertain, who are *payers of scot and lot*. But all the determinations of the right of election are posterior to the reign of Queen Elizabeth, and we must suppose that the House in those determinations, made use of "*scot and lot*" in the general popular sense, for, when they were made, I believe, no special tax or duty was known by those names*.

We are therefore to understand, that, by persons *paying scot and lot*, the House meant those persons whose circumstances are sufficiently independent to enable them to contribute, in general, to such taxes and burthens as they are liable to, as inhabitants of the place; and, seeing the poor-rate, ever since the 43d year of Queen Elizabeth, has been the most considerable and permanent local tax, the payment of *that* affords such a presumption, that the person paying is in a situation to contribute to the rest, as to have been constantly taken for the criterion of the right to vote, whenever

* In Scotland, when a person petitions to be admitted a burgher of a royal borough, he engages that he will "*scot and lot*, watch and
"ward," &c. Case of Linlithgow in the House of Lords, 10 April 1775.

that

that right is similar to what it is in Milborne Port. The statute for regulating elections in the city of London, (11 Geo. I. cap. 18. § 9.) ascertains, in a very particular manner, how the legislature understood what it was to *pay scot* in that city, and corroborates what I have just said on this subject.

Note
(E.)

P. 129. (F.) This decision of the Committee is consonant to the determinations of the courts of law, in settlement cases.

Note
(F.)

“ And though the rate be in form, or in the manner of making it, not strictly legal, but void; yet if the party be rated, and pay to such a rate, he shall gain a settlement.” Burn’s Justice, Title, Poor, Settlement by Rates, p. 385.

[142]

“ But a man must be rated, and must pay, to gain a settlement.” *Ibid.* p. 384.

P. 132, 133. (G.) 12 and 13 Will. III. cap. 10. § 89. “ No member of the House of Commons shall be capable of being a commissioner or farmer of the customs, or of holding or enjoying in his own name, or in the name of any other person in trust for him, or for his use and benefit, or of executing by himself, or his deputy, any office, place, or employment, touching, or concerning the farming, collecting, or managing the customs.”

Note
(G.)

§ 90. “ If a member of the House of Commons, shall, during the time of his being a member of Parliament, by himself, or his deputy, or any other in trust for him, or for his benefit, take, enjoy, or execute, any office, place, or employment touching, or concerning the farming, collecting, or managing the customs, such person is hereby declared and enacted to be absolutely incapable of sitting, voting, or acting, as a member of the House of Commons in such Parliament.”

Note
(G.)

For sect. 25 and 29 of 6 Anne, cap. 7. see the Case of North Berwick, &c. *infra*.

[143]

In the Commentaries on the Laws of England, it is laid down, that no officer of the customs is capable of *being elected*, vol. I. p. 175, 4to. Yet the case of Sir Richard Allin (Note H) seems to prove the contrary.

Note
(H.)

P. 133. (H.) " The House being acquainted that Sir Richard Allin, lately adjudged to be duly elected a burgesse to serve in this present Parliament, for the borough of Dunwich, desires the opinion of the House (before he takes his place) upon the clause in the act of Parliament of the 12 and 13 of Will. the III^d. (intituled, an act for granting an aid to his majesty, for defraying the expence of his navy, guards, and garrisons, for one year, and for other necessary occasions) which relates to the officers of the customs, in regard he was, by letters patent granted by King Charles the II^d. dated the 31st day of May in the 30th year of his reign, made (by the name of Richard Anguish) collector of the great and petty customs in the port of Yarmouth, for his life; but surrendered such office *the 7th day of February* instant, which was acknowledged and *enrolled* the next day. And a motion being made, and the question being put, that the debate be adjourned, it passed in the negative, 170 to 106. Then the letters patent and surrender were produced, and the surrender read. Resolved, That the said Sir Richard Allin be admitted to take his seat in this House." Journ. vol. xvi. p. 98. col. 2. p. 99. col. 1.

[144]

The merits of the election had been determined *on the 5th of February*, *ibid.* p. 94. col. 1. Sir Richard Allin was one of the petitioners, and no objection was taken to him as possessed of this office, on that occasion*.

P. 136.

[* But in the case of Bedford, 1728, (Journ. vol. xxi. p. 138. col.

2.) Mr. Ongley having an office in the customs, and no surrender of

P. 136. (I.) By this, and the following Cases of Morpeth, Westminster, Hindon, and Downton, the reader will see the forms, in which the determinations of Committees are communicated to the House, in the different instances of double and of false returns, and when the decision on the merits of the election is either in favour of the sitting members, or petitioners, or the election is declared to be void.

of the office *before the election* appearing, the Committee and the House resolved, that “having an office, &c. *at the time of the election*, he is incapable of claiming to sit for the said borough.”]

II.

THE
C A S E

Of the BOROUGH of

M O R P E T H,

In the County of NORTHUMBERLAND.

The Committee was chosen on Tuesday, the 24th of January, and consisted of the following Gentlemen :

Lord Fred. Campbell, Chairman,	} Members for	Glasgow, &c.
Thomas Foley, Esq. - - - -		Herefordshire.
Hon. William Howe, - - - -		Nottingham.
Richard Coombe, Esq. - - - -		Aldborough, Suff.
Sir John Barrington, Bart. - -		Newton, Hants.
Viscount Wenman, - - - -		Oxfordshire.
Sir Charles Cocks, Bart. - - -		Ryegate.
Richard Milles, Esq. - - - -		Canterbury.
Filmer Honywood, Esq. - - - -		Steypning.
Molyneux Shuldham, Esq. - - -		Fowey.
Christopher Griffith, Esq. - - -		Berkshire.
James Whitshed, Esq. - - - -		Cirencester.
Sir Thomas Miller, Bart. - - -		Lewes.

NOMINEES,

Of Mr. Byron.

Sir Charles Bunbury, Bart. - -	Suffolk.
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Of Mr. Eyre.

Lord Advocate of Scotland, - -	Peeblesshire.
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PETITIONERS.

The Honourable William Byron.

Certain Freemen, and Electors of the Borough of Morpeth.

Sitting Member.

Francis Eyre, Esq.

COUNSEL.

For the Petitioners.

Mr. Kenyon,	Mr. Lee.
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For the Sitting Member.

Mr. Mansfield,	Mr. Widmore.
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THE
C A S E

Of the BOROUGH of

M O R P E T H.

ON Tuesday, the 6th of December, 1774, two petitions had been presented to the House.

One, of Mr. Byron, setting forth; That, at the last election, when Peter Delmé, Esq. Francis Eyre, Esq. Thomas Charles Bigge, Esq. and the petitioner, were candidates for the borough of Morpeth, Mr. Delmé and the petitioner, at the conclusion of the poll, had the majority of legal votes, in the judgment of the two bailiffs, who presided, and are the proper returning officers, and who accordingly declared them duly elected; but that they were afterwards compelled, by the violence and threats of a numerous, and outrageous mob,

[148] mob, to sign a return of Mr. Eyre, instead of the petitioner, together with Mr. Delmé; praying, therefore, that the name of Mr. Eyre might be erased from the return, and the petitioner's inserted instead thereof; and to give him such other relief as the case required, and the House should think reasonable.

Another, of certain freemen, and electors of the borough, to the same purpose; and likewise praying that such punishment should be inflicted upon the offenders, as to the House should seem meet

They were ordered to be taken into consideration on Tuesday, the 24th of January, 1775 (1.)

On Monday, the 19th of December, a petition of Mr. Bigge was presented, setting forth; That a majority had been obtained for Mr. Delmé, by the corrupt and illegal practices of Mr. Delmé and Mr. Byron, and the partiality of the returning officers, in rejecting the petitioner's votes; and that he ought to have been returned; and praying that he might be declared duly elected together with Mr. Eyre, or receive such relief as to the House should seem meet.

[149] And also a petition of several aldermen, and free burgeses of Morpeth, containing similar allegations, and praying, in like manner, that Eyre and Bigge should be declared duly elected, and the rejected votes, legal votes.

(1) Votes, p. 17, 18.

They

They were ordered to be taken into consideration at the same time with the two former, on the 24th of January. (1.)

But, on Friday, the 23d of December, a motion was made, that the order for hearing the two last mentioned petitions on the 24th of January along with the two former, should be discharged; which, after a debate on the subject, was ordered to be done, and a new day, viz. the 12th of July 1775, was appointed for the consideration of those petitions. (2.)

Hence, only the merits of the two first petitions were referred to the Committee chosen on the 24th of January.

And there appearing, at the opening of the cause, some doubt among the counsel, whether the sole question was, the freedom and the validity of the return of Mr. Eyre, or, whether they might not go into the merits of the election; the Committee were reminded, by one of the members, that this had been already decided in the House; [150] and the court being cleared; after deliberation, they resolved, that the counsel must confine themselves solely to the return; and in the course of the evidence, they would not suffer any questions to be put that respected the merits.

The counsel for the petitioners were going to call one of the returning officers, to prove that they had been compelled by force to make a false return.

(1) Votes, p. 96.

(2) Votes, p. 111, 112.

His evidence was objected to.

It was said, that he came to excuse and explain a return, as false, which he had given under his hand and seal as true; that, if it were a false return, he was liable to an action, and therefore interested in giving any account of it.

To this it was answered, that the maxim, that a man shall not be admitted to prove his own turpitude, is neither true in law, nor, if it were, could apply here; and that nothing said by the returning officer on the present occasion could be produced, either for, or against him, in an action for a false return.

The Committee over-ruled the objection :

[151] And it was proved by the clerk to the returning officers who took the poll, by the returning officers, and by a great many other witnesses, that at the close of the poll, the majority was, and was declared to be, in favour of Delmé and Byron; that the bailiffs were proceeding to make a return of them, when they were forced by open violence, and a just apprehension of immediate danger, both on the evening of the election, and next morning, when the return was executed, to sign a return of Eyre and Delmé.

It was also proved, that Mr. Eyre, on the morning of the election, before it began, made a very inflammatory speech to the people. That after the riot began, he having retired some time before, the returning officers sent him word, they would return whom he pleased : And that an answer being

ing brought them, that they must return himself and Delmé, they complied, on which the riot ceased. That he insisted, the day following, that one of the returning officers should deliver the return to one of his partizans, and neither carry it himself, nor accompany the other, while he should carry it, to the sheriff; and that, on one of the returning officers refusing to comply with some demand of his, he said "*if you don't,*" and then looked round to the mob, implying, as he (the returning officer) thought, that if he did not, the mob would compel him. [152]

The counsel for the petitioners insisted that the Committee ought to make a special report against the persons concerned in the riot, that the House might proceed against them, as had been done in other cases of the same sort; and they cited the case of Coventry, 20 November 1722, when all the persons principally concerned in a riot at an election there, were ordered into custody (1). (A).

The Committee, however, made no special report.

On Friday the 27th of January, their Chairman informed the House, that they had determined,

" That Francis Eyre, Esq. is not duly returned
 " a burges to serve in this present Parliament
 " for the borough of Morpeth, in the county of [153]
 " Northumberland.

" That the Honourable William Byron, the
 " petitioner, ought to have been returned a bur-

(1) Journ. vol. xx. p. 60. col. 2.

“ ges to serve in this present Parliament for the
 “ said borough of Morpeth.”

And their determinations were ordered to be entered in the Journals of the House :

And the return to be amended, by erasing the name of Mr. Eyre, and inserting that of Mr. Byron in its place (1) :

Which was done accordingly.

At the same time an order was made,

“ That Francis Eyre, Esq. and the freemen and
 “ electors of the borough of Morpeth, in the
 “ county of Northumberland, be at liberty to pe-
 “ tition this House, to question the election of
 “ the Hon. William Byron, within fourteen days
 “ next, if they think fit (2).”

[154] And, accordingly, on Wednesday, the 8th of February, a petition of Mr. Eyre was presented to the House, to the same effect with those of Mr. Bigge, and of the aldermen, &c. of Morpeth ; and charging Mr. Byron and Mr. Delmé directly, with bribery by themselves and agents.

Which petition was also appointed to be taken into consideration on the 12th of July (3).

(1) Votes, p. 155, 156.

(2) Votes, p. 157.

(3) Votes, 196, 197, *Vide*

Supra, p. 149.

N O T E

ON THE CASE OF

M O R P E T H.

P. 152. (A.) "Resolved, That it appears to this House,
 " that there were notorious and outrageous riots, tumults,
 " and seditions, at the late election of citizens to serve in
 " Parliament for the city of Coventry, in defiance of the
 " civil authority, and in violation of the freedom of elec-
 " tions, caused by the agents and friends of the petitioners,
 " who were the authors, contrivers, and promoters of the
 " said riots, tumults, and seditions.—Resolved, That it ap-
 " pears to this House, that Charles Buggs was one of the
 " principal contrivers, and promoters, of the riots, tumults,
 " and seditions, at the late election of citizens to serve in
 " Parliament for the city of Coventry." Then follows
 an order for taking him into the custody of the serjeant at
 arms; and similar resolutions, and orders, relating to eight
 other persons, by name. Journ. vol. xx. p. 60. col. 2.

Note
 (A.)

III.

THE

C A S E

OF THE

CITY AND LIBERTY

OF

WESTMINSTER.

The Committee was chosen on Wednesday, the 25th of January, 1775, and consisted of the following Gentlemen :

Lord Charles Spenceer, Chairman,	} Members for	Oxfordshire.
Anthony Eyre, Esq. - - - -		Boroughbridge.
Charles Ogilvy, Esq. - - - -		West-Looe.
Viscount Chewton, - - - -		Newcast. und. l.
Hugh Owen, Esq. - - - -		Pembroke.
James Scawen, Esq. - - - -		Surrey.
Sir Robert Barker, Knt. - - -		Wallingford.
Sir Matthew White Ridley, Bart.		Newcastle.
Thomas Brand, Esq. - - - -		Arundel.
William Drake, jun. Esq. - - -		Agmondesham.
Benjamin Langlois, Esq. - - -	} Members for	St. German's.
George Bridges Brudenell, Esq. -		Rutlandshire.
William Adam, Esq. - - - -		Gatton.
NOMINEES,		
<i>Of the Petitioners :</i>		
George Johnstone, Esq. - - - -	} Members for	Appleby.
<i>Of the Sitting Members :</i>		
Sir Richard Sutton, Bart. - - -		St. Alban's.

PETITIONERS:

Henry Morres, Lord Viscount Mountmorres in the Kingdom of Ireland, and several other Inhabitants, Electors of the City and Liberty of Westminster.

Sitting Members :

Earl Percy. Lord Thomas Pelham Clinton;

COUNSEL,

For the Petitioners :

Mr. Lee, Mr. Wilson.

For the Sitting Members :

Mr. Mansfield, Mr. Hargrave;

THE
C A S E

Of the CITY and LIBERTY of

W E S T M I N S T E R.

ON Thursday, the 26th of January, the Committee being met, the petition was read, setting forth; That, at the late election for the city and liberty of Westminster, the petitioner Lord Mountmorres, Charles Stanhope, commonly called Lord Viscount Mahon, Hugh Percy, commonly called Earl Percy, Thomas Pelham Clinton, commonly called Lord Thomas Pelham Clinton, and Humphrey Cotes, Esq. being candidates, the king's menial servants not having proper houses of their own within the city of Westminster, gave voices in the said election, contrary to an express resolution of the House; that divers peers and lords of Parliament publicly canvassed, and otherwise unduly interfered in the election, contrary to

[160]

several express resolutions of the House; that during the election, after the teste and issuing out of the writ, Lord Percy and Lord Thomas Pelham Clinton, by themselves, or agents, were guilty of bribing, corrupting, and entertaining the voters; and that they allowed to the electors, and several persons who had, or claimed a right to vote, money, meat, drink, entertainment, or provision, and that by those, and other undue means, a majority of votes was procured for Lord Percy and Lord Thomas Pelham Clinton, and they were returned; and praying such relief as upon examination should appear just (1).

There is no general determination of the House of the right of election in Westminster.—But it seemed to be agreed to be, “In the inhabitants, “householders, paying scot and lot.”

The resolution of the House concerning the king’s menial servants, referred to in the petition, is as follows:

[161] 15 Nov. 1680. Resolved, “That the king’s “menial-servants, not having proper houses of “their own within the city of Westminster, have “not right to give voices in the election of citizens “to serve in parliament for the said city (2).”

And the following resolution, respecting the interference of peers in the election of members of the House of Commons, has been renewed at the

(1) Votes, 12 Dec. 1774.
p. 68, 69.

(2) Journ. vol. ix. p. 654,
col. 1.

beginning of every session ever since the 3d of January 170 $\frac{1}{2}$ (1):

Resolved, " That it is a high infringement of
 " the liberties and privileges of the Commons of
 " Great Britain, for any lord of Parliament, or
 " any lord lieutenant of any county, to concern
 " themselves in the elections of members to serve
 " for the Commons in Parliament."

The numbers on the poll, stood thus:

For Earl Percy	-	-	-	4,994	
For Lord Thomas Pelham Clinton				4,744	
For Lord Mountmorres	-	-	-	2,531	
For Lord Mahon	-	-	-	2,342	[162]
For Humphrey Cotes, Esq.	-			130	

The counsel for the petitioners said, it was not their intention to contend that the majority was not in favour of the sitting members; but, that they would prove the different allegations of the petition, by which it would appear, that the rights of election had been invaded, in a manner highly alarming, so as to call for the interposition and censure of the House, which they hoped would take place, on the report of the Committee.

They however were not able to prove any direct solicitation of any peers. A letter had been sent from Lord Exeter's steward, in the country, to his porter in London, desiring him to ask certain votes for the sitting members. The porter himself gave

(1) Journ. vol. xiii. p. 648, col. 1. Votes, 5 Dec. 1774. p. 6.
 evidence

evidence of this, and that he had so done; but it did not appear that the steward had acted by Lord Exeter's orders.

It was proved that the duke of Northumberland had *called on* some of the lower class of voters, during the election.

[163] It appeared, that there had been consultations of Lord Thomas Pelham Clinton's friends about opening houses, but no treating at *his* expence was proved. On the contrary, they had abandoned that design as unsafe. Very nearly the same, on this head, came out concerning the duke of Northumberland. A letter was produced, in his name, to a man who keeps a public-house, bespeaking his house; but it appeared that this letter was not in the duke's hand-writing, and the person himself proved, that the duke had afterwards told him, that no house was to be opened for his son.

There was no evidence of bribery, that came home to the sitting members.

[164] It was proved, and hardly denied by the counsel on that side, that about nineteen persons, under the description of the resolution of 1680, had polled for the sitting members. They had all been solicited for their votes by Lord Mountmorres and Lord Mahon. They were inhabitants of the Mews, and their houses had of late, for the first time, been rated to the parish, on which account they claimed to be electors; but they acknowledged that their rates were paid by the King.

These

These being the principal facts proved on the part of the petitioners, the counsel for the sitting members insisted, that the petition was frivolous, and vexatious, and ought to be so reported to the House. (A.)

But on Friday, the 27th of January, the Committee, by their Chairman, informed the House, *generally*, that they had determined,

“ That the Right Hon. Hugh Percy, commonly called Earl Percy, is duly elected a citizen to serve in this present Parliament for the city of Westminster.”

“ That the Right Hon. Thomas Pelham Clinton, commonly called Lord Thomas Pelham Clinton, is duly elected a citizen to serve in this present Parliament for the city of Westminster.”

And Lord Thomas Pelham Clinton, having been likewise chosen a burges for the borough of East Retford, in the county of Nottingham, made his election to serve for the city of Westminster (1). (B.)

(1) Votes, p. 155.

N O T E S

ON THE CASE OF

W E S T M I N S T E R.

Note
(A.)

PAGE 164. (A.) 13 February 170⁹, the following resolution was first made (Journ. vol. xiii. p. 326. col. 2, 327. col. 1.) and has been renewed ever since, at the beginning of every session (Votes, p. 5.)

“ Resolved, That where this House shall judge any petition touching elections to be frivolous and vexatious, the House will order satisfaction to be made to the person petitioned against.”

But before the first date of that resolution, as well as since, there are cases, where the House has ordered the petitioners to pay the costs and expences of the persons petitioned against. This will appear by the following instances, taken from the Journals :

CASES OF FRIVOLOUS AND VEXATIOUS PETITIONS.

I. *Case of Southwark.*

27 December 1695. The committee of privileges and elections having reported to the House their opinion, that the petition of Sir George Meggot, Knight, complaining

*

of

of an undue election for the borough of Southwark, in the county of Surry, " was vexatious, frivolous, and groundless," and it having also appeared, from the evidence reported by the committee, that he had scandalized the House; the House came to these two resolutions; viz.

" Resolved, That Sir George Meggot, having preferred
" to this House a groundless and vexatious petition, relating to the election of members to serve in this present
" Parliament for the borough of Southwark, and having
" scandalized this House in declaring that, without being
" duly chosen, he had friends enough in this House to bring
" him into this House, be taken into the custody of the
" serjeant at arms attending this House.

" Resolved, That Sir George Meggot do make satisfaction to the members of this House he petitioned against,
" for the costs and expences they have been put unto by
" reason of such petition." Journ. vol. xi. p. 371. col. 1.

II. *Case of Totness.*

4 March 1698. " Resolved, That Sir Richard Gipps,
" having preferred to this House a frivolous, vexatious, and
" groundless petition, relating to the election of members to
" serve in this present Parliament for the borough of Totness, in the county of Devon, be taken into the custody
" of the serjeant at arms attending this House."

" Resolved," &c. in the same words as the second resolution in the case of Southwark. Journ. vol. p. 490. col. 1.

III. *Case of Ipswich.*

3 February 1718. The Committee of privileges and elections having reported their resolution, that the petition of William Thomson, Esq. complaining of an undue election for the borough of Ipswich, in the county of Suffolk, was frivolous, and vexatious; the House, on a division (195 to 113), agreed to it.

" Ordered,

[167]

Note
(A.)

" Ordered, That William Thomson, Esq. do make " satisfaction to Sir William Baker, for," &c. in the words of the second resolution in the two first cases. Journ. vol. xvi. p. 478. col. 1. 2.

IV. *Case of Shrewsbury.*

27 May 1714. " Resolved, That the petition of J. P, " &c. and several others whose names are thereunto sub- " scribed, burgessees of, and inhabitants in, Shrewsbury, " complaining of an undue election and return of Edward " Cresset, Esq. is frivolous, vexatious, and scandalous."

" Ordered, That the said petitioners do make satisfac- " tion," &c. as above. Vol. xvii. p. 650. col. 1.

V. *Case of the District of Kilrenny, Anstruther Easter, Pittenween, Anstruther Wester, and Crail.*

20 December 1722. " Resolved by the Committee, and " agreed to by the House, (without a division) That the " petition of David Scot, Esq. complaining of an undue " election and return of Philip Anstruther, Esq. to sit in " this present Parliament for the said district of boroughs, " is groundless, frivolous, and vexatious."

" Ordered, That David Scot, Esq." &c. as above, Vol. xx. p. 87. col. 2.

VI. *Case of Aylesbury.*

21 March 1764. The petition of Thomas Scrope, Esq. complaining of an undue election for the borough of Aylesbury, in the county of Buckingham, having been referred to the Committee of privileges and elections; they reported, that no person appearing to prosecute the petition on the part of Mr. Scrope, they had come to two resolutions; one, that the sitting member (Anthony Bacon, Esq.) was duly elected; the other, that the petition of Thomas Scrope, Esq. was frivolous and vexatious. The House
agreed

agreed to the first. An Amendment was proposed to the second, by leaving out the words (*and vexatious*), which was agreed to, without a division; and then the second resolution, so amended, was agreed to. Journ. vol. xxix. p. 972. col. 1.

Note
(A.)

It does not appear, in any of the above cases, in what manner the House enforced the payments they ordered*. From the case of Aylesbury, it would seem that when a petition is voted to be *frivolous*, without being called *vexatious*; the House will not order the petitioner to pay the costs.

P. 164. (B.) Ever since the 11th of May 1661 (Journ. vol. viii. p. 247.) it has been an order repeated at the beginning of every session: (Votes, p. 5.)

Note
(B.)

“ That all members who are returned for two or more places, do make their election by this day three weeks (referring to the day of the order), provided there be no question upon the return for that place.”

[169]

When there is, the practice is, that the person who is returned for more than one place, shall make his election as soon as his return which was controverted, is affirmed; but I do not find that there is any rule fixing a particular day for that purpose.

[* But vide the provisions of 28 Geo. III. c. 52. § 18, 19, 20, 21, 22, 23, 24.]

THE UNIVERSITY OF CHICAGO

PH.D. THESIS

BY

JOHN H. ...

IN THE DEPARTMENT OF ...

CHICAGO, ILLINOIS

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IV.

THE

C A S E

Of the BOROUGH of

H I N D O N,

In the County of WILTS.

VOL. I.

K

The Committee was chosen on Tuesday, the 31st of January, and consisted of the following Gentlemen:

Thomas Dundas, Esq. Chairman,	} Members for	Stirlingshire.
Samuel Marsh, Esq. - - - -		Chippenham.
Gerrard William Vanneck, Esq. -		Dunwich.
Charles Brett, Esq. - - - -		Lestwithiel.
John Aubry, Esq. - - - -		Aylesbury.
Jacob Wilkinson, Esq. - - - -		Berwick.
Filmer Honywood, Esq. - - - -		Steyning.
William Wollaston, Esq. - - - -		Ipswich.
Hon. John Vaughan - - - -		Berwick.
Edward Phelps, Esq. - - - -		Somersetshire.
Benjamin Allen, Esq. - - - -		Bridgewater.
Richard Benyon, Esq. - - - -		Peterborough.
Hon. Lucius Ferdinand Cary -		Bridport.
N O M I N E E S.		
John Elwes, Esq. - - - -	} Members for	Berkshire.
George Byng, Esq. - - - -		Wigan.

P E T I T I O N E R S.

James Calthorpe, Esq. and Richard Beckford, Esq.

Sitting Members :-

Richard Smith, Esq. Thomas Brand Hollis, Esq.

Counsel for the Petitioners :

Mr. Bearcroft, Mr. Lee.

For Mr. Smith :

Mr. Serjeant Davy, Mr. Potter.

For Mr. Hollis :

Mr. Mansfield, Mr. Buller.

T H E
C A S E
Of the BOROUGH of
H I N D O N.

ON Wednesday, the first of February, the Committee being met, the petition was read, setting forth; That the two sitting members had, by the bribery of themselves and agents; previous to, and during the election, procured themselves to be returned, although the petitioners were duly elected, and ought to have been returned. (1).

The last determination of the House, of the right of election in this borough, is as follows :

12 April, 1728, “ Resolved, That the right of
“ election of burgesſes, to ſerve in Parliament, for
“ the borough of Hindon, in the county of Wilts,
“ is in the inhabitants of houſes within the ſaid

(1) Dec. 6. Votes, p. 19.

“borough, being housekeepers, and parishioners,
“not receiving alms. (1).”

The numbers on the poll were as follows:

For Smith	- - - -	163
For Hollis	- - - -	161
For Calthorpe	- - - -	63
For Beckford	- - - -	32

The counsel for the petitioners, in opening their case, stated, that they hoped to bring home such proof of bribery, to all, or the major part, of the voters for the sitting members, as would annihilate their votes, and leave the majority with the petitioners, or at least, by proving bribery on both the candidates who had been returned, they would disqualify them from sitting, and avoid the election.

When they had closed their evidence, and arguments, the counsel for the sitting members, endeavoured to justify their clients and their voters, and retorted the charge of bribery on the petitioners, and their voters. (2).

The evidence on both sides may be seen in the report, printed by order of the House.

[175] In the course of the evidence produced on the part of the petitioners, a witness was called, to prove bribery, by a *supposed* agent of one of the sitting members. The Committee directed the counsel first to give evidence to establish the

(1) Journ. vol. xxi. p. 132.
col. 2.

(2) *Vide infra*, Case of St. Ives, Note (B.)

agency, before they went into any proof of bribery committed by him. (1).

On Monday, the 6th of February, the chairman of the Committee reported, that the Committee having met that morning at 10 o'clock, pursuant to their adjournment of the Saturday, and Jacob Wilkinson, Esq. one of the members, not attending, they had adjourned till three in the afternoon, and, at the same time, he informed the House, that he had, the day before, received a letter from Mr. Wilkinson, inclosing another from Bath.

Those letters being delivered in at the table, and the receipt of them, and the hand-writing of Mr. Wilkinson verified upon oath, they were read, and the House resolved,

That the excuse alledged by Mr. Wilkinson in his letter should be allowed, and that he should be excused from farther attendance on the Committee; and it was ordered, that the Committee should proceed without him, on the day following at 11 o'clock. (2). [176]

The counsel finished on Friday, the 10th of February.

On Tuesday, the 14th of February, the Chairman of the Committee informed the House, that they had determined,

“ That Richard Smith, Esq. is not duly elected

(1) *Vide infra*, Cases of (2) Votes, p. 184, 185
Bristol and Shaftesbury.

“ a burges to serve in this’ present Parliament for
 “ the borough of Hindon, in the county of Wilts.

“ That Thomas Brand Hollis, Esq. is not duly
 “ elected a burges to serve in this present Parlia-
 “ ment for the said borough of Hindon.

“ That James Calthorpe, Esq. one of the peti-
 “ tioners, is not duly elected a burges to serve in
 “ this present Parliament for the said borough of
 “ Hindon.

[177] “ That Richard Beckford, Esq. one of the peti-
 “ tioners, is not duly elected a burges to serve
 “ in this present Parliament for the said borough
 “ of Hindon.

“ That the last election of burgeses, to serve
 “ in this present Parliament, for the said borough
 “ of Hindon, was a void election. (1).

“ At the same time, Mr. Dundas acquainted
 “ the House, that in the course of the examina-
 “ tion into the merits of the petition of James
 “ Calthorpe, Esq. and Richard Beckford, Esq. it
 “ having appeared to the Committee, that the
 “ most flagrant and notorious acts of bribery and
 “ corruption had been practised; and that a very
 “ considerable majority of the electors of the bo-
 “ rough of Hindon had been bribed and corrupted,
 “ in a very gross and extraordinary manner; and
 “ that several others of the said electors had been
 “ concerned as agents for that purpose; the Com-
 “ mittee, desirous that the House may adopt such
 “ measures as may discourage, and, if possible,

(1) Votes, p. 217.

“ put

H I N D O N.

“ put an end to a practice so subversive of the
“ freedom of elections, had directed him to lay be-
“ fore the House, the whole of the evidence given [178]
“ before the said Committee, with their opinions
“ thereupon; and he read the report in his place,
“ and afterwards delivered it in at the table, where
“ the same was read; and the resolutions of the
“ Committee are as followeth:

“ Resolved, That it appears to this Committee,
“ that Richard Smith, Esq. by his agents, has been
“ guilty of notorious bribery, in endeavouring to
“ procure himself to be elected and returned a
“ burgess, to serve in this present Parliament,
“ for the borough of Hindon, in the county of
“ Wilts.”

The like resolution respecting Mr. Hollis.

“ Resolved, That it appears to this Committee,
“ that James Calthorpe, Esq. by his agents, has
“ been guilty of notorious bribery, in endeavour-
“ ing to procure himself to be elected and returned
“ a burgess to serve in this present Parliament for
“ the said borough of Hindon.

“ Resolved, That it appears to this Committee,
“ that Richard Beckford, Esq. has, by his agent, [179]
“ endeavoured by promise of money, to procure
“ himself to be elected, and returned a burgess, to
“ serve in this present Parliament for the said bo-
“ rough of Hindon.

“ Resolved, That it appears to this Committee,
“ that the Rev. John Nairn, of Hindon; Fasham
“ Nairne, Esq. late of Bury-street, St. James's,

“ Francis Ward, of Sherborne-lane, London;
 “ — Stevens, a butcher, at Salisbury, com-
 “ monly called Jobber Stevens, &c. (in all, thir-
 “ teen, specified by name) have acted as agents,
 “ and have been accessory to, and concerned in,
 “ the notorious acts of bribery and corruption,
 “ that have been practised at the last election for
 “ the said borough of Hindon.

“ Resolved, That it is the opinion of this Com-
 “ mittee, that the House be moved, for leave to
 “ bring in a bill, to disfranchise the said borough
 “ of Hindon, in the county of Wilts (1).”

[180] The consideration of this report was adjourned
 till the 23d of February, and, in the mean time, an
 order was made, that the Speaker should not
 issue his warrant for a new writ, till the House pro-
 ceeded to such consideration (2).

Though the account of the further proceed-
 ings of the House relative to this matter, does not
 come within the strict limits of the present design,
 yet, as they were the immediate consequence of the
 proceedings of the Committee, the history of the
 one would be incomplete without that of the
 other.

On Thursday the 23d of February, the two first
 resolutions of the Committee, being read a second
 time, were agreed to by the House; and the third
 resolution being read a second time, on the question
 being put for the House to agree to it, a motion
 was made that the statute of the 10th of George

(1) (2) Votes, p. 217, 218.

III. should be read; which was done accordingly, and then the third resolution was agreed to.' When the fourth resolution was read the second time a debate ensued, and a motion was made, that it should be adjourned for three months, but this passed in the negative; and the fourth resolution, and then the fifth (being read a second time) were agreed to. [181] The sixth resolution (being read a second time) Mr. Dundas moved the House accordingly; and the question being put in the words of the resolution, the previous question was put, "That that question be now put," which passed in the negative. (A.)

It was then ordered, that leave be given to bring in a bill to incapacitate from voting at elections of members of Parliament, 190 (1) persons by name (including several of those mentioned in the fifth resolution of the Committee) out of two hundred and ten who had polled at the election; and for the preventing bribery and corruption in the election of members to serve in Parliament for Hindon. (B.)

Mr. Dundas, Mr. Byng, Mr. Elwes, and the other members of the Committee, were ordered to prepare and bring in this bill; and, in the mean time, it was resolved, That the Speaker should not issue his warrant to make out a new writ, for a month longer (2). [182]

On the 8th of March, Mr. Dundas presented

(1) The number in the printed bill is stated to be 188, but on reckoning the names, there appears to be a mistake of two. (2) Votes, p. 272, 273.

the bill; which was read, and ordered to be read a second time, on the 29th of that month (1). It was of course also ordered to be printed, and a printed copy of the bill, with the order for the second reading, was ordered to be served on all the persons named in it: and it was resolved that leaving them at their respective abodes should be good service.

[183] On the 28th, a petition of certain inhabitants of Hindon was presented to the House, setting forth; that they observed by the Votes, that a bill was depending, by which their rights would be materially affected, and the usual mode of election for the borough essentially altered; that they felt, with infinite concern, the censure that had been passed by a Committee of the House, on many of the electors; but, at the same time, relying upon the candour of the House, they hoped it was not intended that they, who were innocent, should be included in a punishment which only ought to extend to those who had made an improper use of their franchise; and praying that they might be heard by themselves, or counsel, against the bill.

This petition was ordered to lie on the table until the bill should be read a second time (2).

The day following (29th of March) the order of the day being read, and the question being proposed for reading the bill a second time, the messenger who had been charged with the service of the copies of it on the parties, was called to prove

(1) Votes, p. 314.

(2) *Ibid.* p. 445, 446.

such service; and Thomas Spencer, one of the persons named in the bill, was, at his own desire, heard on behalf of himself, against the bill.

Then, in consequence of a motion for that purpose, the entry in the Journals of the House, of the 22d of March 172²/₃, and the 4th of April 1723, [184] of the proceedings of the House upon the bill for inflicting certain pains and penalties upon Francis lord bishop of Rochester, was read.—After which, the bill was read a second time; and it was resolved, that it should be considered in a Committee of the whole House on the 5th of April, and that the petitioners against it should be heard before that Committee, by themselves or their counsel.

A petition of certain persons named in the bill was then presented, complaining that they were aggrieved by being incapacitated by it, and praying to be heard by themselves or counsel. This petition was also referred to the Committee of the whole House, and leave was given to the petitioners to appear against it, by themselves or counsel. After this, on a motion for that purpose, the first resolution of the select Committee was read, and a motion was made, and the question put;

“ That it be an instruction to the said Committee of the whole House, that they have power
“ to receive a clause, or clauses, for inflicting a [185]
“ suitable punishment on the said Richard Smith,
“ Esquire, for his said offence.”

It passed in the negative.

And

And the second resolution being read, and a similar question put, respecting Mr. Hollis, that, likewise, passed in the negative (1).

On Friday, the 31st of March, the order for the House to resolve itself into a Committee of the whole House, on the 5th of April, on the bill, was discharged; and the 10th of April appointed for that purpose (2).

On Monday, the 10th of April, the order of the day being read, a petition of John Nairn, clerk, was presented, denying the charges brought against him before the select Committee, and praying to be heard, by his counsel, against that part of the bill which tended to incapacitate him. This was granted, and his petition referred to the House.

[186] A motion being now made, and the question being proposed, that the Speaker should leave the chair, the House was moved that the entries in the Journal of the House, of the 20th of March, 1728, and the 3d, 9th, and 12th of April, 1729, of the proceedings of the House with relation to the bill to disable Thomas Bambridge to hold or execute the office of Warden of the prison of the Fleet, or to have or exercise any authority relating thereto, might be read; which being done, the House resolved itself into a Committee of the whole House, on the bill.

In this Committee, it being proposed to call certain persons, named in the bill, and incapacitated by it, to prove the allegations it contained, (for it

(1) Votes, p. 457, 458.

(2) *Ibid.* p. 473.

had been debated, and settled in the House, in some former stage of the business, that the evidence given before the select Committee, and reported by them, could not be admitted on this occasion), it was objected that they, being parties, and like defendants in an indictment, could not, without overturning the known rules of law and justice, be received as witnesses in this case. This objection produced a debate. and though it was treated as of no weight by some gentlemen of the long robe, it was strenuously supported by others, and proved fatal to the bill; for all the persons who were capable of proving the facts, and who had proved them before the select Committee, were themselves offenders, and named in the bill. [187]

When the Speaker resumed the chair, on a motion of Mr. Dundas, leave was given to bring in a new bill, similar to the former (B), but leaving out the names of certain persons who were intended to be made use of as witnesses (1); and Mr. Solicitor-General, Sir George Hay, Mr. Grenville, and Lord George Germaine, together with the members of the select Committee, were ordered to prepare and bring it in.

On Wednesday, the 12th of April, Mr. Dundas presented this new bill, which being received, and read the first time, the House was moved, that the four first resolutions of the select Committee should be read; and this being accordingly done, the 26th day of April was appointed for the [188]

(1) Votes, p. 517, 518, 519.

second reading. A similar order to what had been made on the former occasion was now made relative to the serving the parties with copies; and orders were made severally, that Francis Mead, Thomas Spencer, John Becket (*baker*), John Becket, son of William, John Baldwin, William Crabb, Thomas Penny, Thomas Richardson, and Thomas More, persons named in the former, but omitted in this bill, should attend the House, at the time appointed for the second reading (1).

On Wednesday, the 26th of April, before the order of the day for the second reading of the bill was called for, several petitions relative to this business were presented to the House.

[189] A petition of Thomas Howell, and others, setting forth; that they had been included in the former bill of incapacitation, and were so in *that* now depending, and representing to the House “ that, as they had done nothing to invade the ordinary course of the laws against bribery and corruption, and had always been forth-coming, and never attempted to prevent the service of legal process, they hoped no new or extraordinary mode of prosecution or punishment would be adopted against them, by which they might be deprived of the usual advantages given by law, in the ordinary course of trial;” and suggesting that a bill, tending to deprive any subject of this realm of his greatest and dearest franchise, cannot be deemed otherwise than a criminal prosecution

(1) Votes, p. 541, 542.

against

against such subject; and that, being once put upon his defence, he cannot legally be called again to answer the same charge; and that the petitioners had been put to so heavy an expence, in defending themselves against the charges contained in the former bill, that they were unable to defray the expences of the necessary witnesses and journeys to London, to prove their innocence against this second prosecution; praying therefore, that the bill might not pass into a law; and that they might be heard by their counsel on the matters contained in this petition, and might be admitted, before each was put upon his separate defence, to show cause why this mode of prosecution should not be adopted in the present case against them (1). [190]

The general argument in this petition against this mode of prosecution, was much enlarged upon in the different debates in the House. It was said, that, for the legislature to take upon it the juridical authority, was a delicate and dangerous thing, being an encroachment of one part of the state upon the province of another; that it never ought to be done but on very particular occasions, where punishment by the common course of law was not attainable, either on account of the eminence and power of the offender, or for other reasons; or when the remedy provided by law was not adequate to the offence. That these reasons would appear to have operated, in all or most of the cases of bills of attainder, bills of pains and penalties, and bills of in- [191]

(1) Votes, p. 576.

capacitation, which are to be met with in the records of Parliament; and for the proof of this, the cases of bishop Atterbury, and of Bambridge were cited. That even in the late instance of New Shoreham, (though the proceeding then by bill could not be approved of), the circumstances were different from those of the present case, for there the offence was the joint crime of a whole class of men acting as the combined members of an illegal society, but that at Hindon, the offences of each individual were separate and distinct, and each was liable to a distinct prosecution at law, the consequence of which, if he were convicted, would be, as to the loss of his franchise, exactly the same as if he were punished by a bill of incapacitation (1).

[192] The petition was ordered to lie on the table, till the second reading of the bill; the petitioners to be then heard by their counsel against the bill.

A petition of the electors not mentioned in the bill, and against whom there was no charge of bribery, and who had petitioned the House on the 28th of March, against the former bill, was then read, praying to be heard by counsel against that part of the present bill which related to the alteration of the right of election.

This petition was disposed of in the same manner with the one which had just been presented.

Then a third petition from the persons disabled by the bill, praying that they might be heard by

(1) Statute 2 Geo. II. cap. 24.

their counsel, against that part of it which related to their incapacitation;

And a fourth, from John Nairn, clerk, to the same effect with his former petition of the 10th of April, were presented, and disposed of in the like manner with the other two.

Lastly, a petition was presented from Thomas Howell, and Thomas Dukes, setting forth; that they observed that several persons had been left out of the present bill, who were included in the former, for the purpose, as they were informed, of being admitted witnesses, and that they were privy to, and desirous of giving evidence to the House, of very interesting and important transactions, respecting the matters contained in the new bill, which, if discovered, and given in evidence, would effectually invalidate the testimony of some persons included in the former bill and omitted in this; praying therefore, to have their names struck out of the bill, and to be produced and examined as witnesses. [193]

This petition was ordered *generally* to lie on the table.

The order of the day being now read, the bill was ordered to be read, and the counsel against it (Mr. Pepys for the petitioners incapacitated by the bill, Mr. Bearcroft for the other petitioners, electors of Hindon, and Mr. Macdonald for the Rev. Mr. Nairn) being called in, the bill was read a second time, and the petition of Thomas Howell and others was read, and counsel heard. [194]

The bill was then committed to a Committee of the whole House for the ensuing day, and the several petitions were referred to that Committee, and the witnesses ordered to attend (1).

On Thursday, the 27th of April, the petition of Thomas Howell, and others, praying to be admitted witnesses, was referred to the Committee of the whole House; and Mr. Elwes, Chairman of that Committee, reporting, that Thomas Howell, on being examined in relation to the non-attendance of Thomas Spencer and John Becket, two of the witnesses who had been summoned, had grossly prevaricated, he was ordered to be committed to Newgate; and afterwards Mr. Elwes reporting, that William Lucas being examined before the Committee, had grossly prevaricated, and given false evidence, he was ordered to be committed to the Gatehouse.

[195] A similar report, and the like order, were made, concerning Henry Chant.

And Mr. Elwes reporting, that Spencer and Becket had attended the day before, in pursuance of the order of the House, but had purposely kept out of the way, to avoid being served with the order for their attendance this day, they were ordered to be sent for in custody of the serjeant at arms; and an order being made for the House to resolve itself again, on Tuesday following, into a Committee of the whole House, for the further

(1) Votes, p. 577, 578, 579.

consideration of the bill, the orders for the attendance of the witnesses were renewed (1).

On Monday, the 1st of May, Thomas Howell was ordered to be removed from Newgate to the Gatehouse, having petitioned the House for that purpose (2).

On Tuesday, the 2d of May, the serjeant at arms being called upon, to give an account of what had been done in relation to the taking Thomas Spencer, and John Becket, the messengers, who were sent in search of them, informed the House, that very strict enquiry had been made after them, but that they were not yet taken; upon which the Committee of the whole House, for the consideration of the bill, was put off till the Monday following, the orders for the witnesses were renewed, and it being suspected, from the testimony given by the persons who had been committed, that Mr. Smith and Mr. Fasham Nairn had been concerned in secreting Spencer and Becket, they were ordered to attend on the Monday (1).

[196]

On Monday, the 8th of May, petitions were presented from Howell and Lucas, acknowledging their prevarications, which they said were unintentional, but alledging they had declared all they knew concerning Spencer and Becket, and desiring, on account of their poverty, and their having families to maintain, that they might be admitted

(1) Votes, p. 586, 587.

(3) *Ibid.* p. 613.(2) *Ibid.* p. 607.

to ask pardon at the bar of the House, and be discharged without the payment of fees.

These petitions were ordered to lie on the table.

[197] The like information as on the Tuesday preceding, was given by the messengers who had been sent in search of them, concerning Spencer and Becket.

Mr. Smith and Captain Fatham Nairn were then examined, in relation to the non-attendance of Spencer and Becket; after which, the order of the day for the Committee of the whole House on this business being read, it was resolved,

That it appeared to the House. that from the absence of Spencer and Becket, two material witnesses in support of the bill, it would not be expedient to proceed further in it, in this session of Parliament.

It was then severally resolved,

That the House would take the report of the select Committee, who were appointed to try the petition of James Calthorpe, and Richard Beckford, Esq. into further consideration, as early as possible in the next session; that until then, no warrant for a new writ should be ordered;

[198] And, that an humble address should be presented to the King, to issue a proclamation for apprehending Spencer and Becket, with the promise of a reward, so that they might be delivered into the custody of the serjeant at arms during this session of Parliament:

And,

And, this address was ordered to be presented by such members of the House, as were members of the privy council.

Then, upon motion for that purpose, the first resolution of the select Committee, as agreed to by the House on the 23d of February, was read; and then, upon a motion for that purpose, the following entry in the Votes of the House, of the 5th of December last, was read.

“ Resolved, That, if it shall appear that any person hath procured himself to be elected, or returned a member of this House, or endeavoured so to be, by bribery, or any other corrupt practices, this House will proceed with the utmost severity against such person (1).”

And an order made,

[199]

“ That the Attorney General do forthwith prosecute Richard Smith, Esq. for the said offence.”

The second resolution was read in like manner, and the like order made, that the Attorney General should prosecute Mr. Hollis.

The third resolution being also read, and a motion made, and the question proposed, that the Attorney General should prosecute James Calthorpe, Esq. the previous question was put, and resolved in the affirmative; and then the like order was made for the prosecution of Mr. Calthorpe.

(1) Votes, p. 5. *Vide* Case of St. Ives, note (B.)

Lastly, the fourth resolution being read, it was ordered, that the Attorney General should likewise forthwith prosecute Mr. Beckford (1).

[200] The address for apprehending of Spencer and Becket was presented to the King, and the proclamation issued (2); but on Thursday, the 11th of May, they surrendered themselves, and, it being severally resolved by the House, "That they had
" purposely absconded, in order to avoid being
" served with an order for their attendance, as witnesses, on a Committee of the House," they were ordered to be committed to Newgate (3).

(1) Votes, p. 644, 645, 646, (2) *Ibid.* p. 660.

647. (3) *Ibid.* p. 672, 673.

N O T E S

ON THE CASE OF

H I N D O N.

PAGE 181. (A.) It appears, by the Journals, that in 1702, in a case not unlike the present, a bill was brought in for disfranchising this borough, and for transferring the right of choosing two members of Parliament, to all the freeholders of the Hundred where the Borough lies, excepting such of them as had a right to vote for the borough of Downton. On this occasion, a petition from some of the inhabitants of Hindon was presented, in opposition to the bill, and was referred to the Committee appointed to prepare and bring it in. On the 8th of February, 1702³, the bill passed the Lower House; but it dropt in the House of Lords. Journ. vol. xiv. from p. 5, col. 1. to p. 184, col. 1. *passim*.

Note
(A.)

P. 181, 187. (B.) There were different plans proposed for disposing of the two seats in Parliament, in case it had been thought proper to disfranchise the borough of Hindon entirely. Some thought this a fair opportunity of bestowing *actual* representatives on one of those great manufacturing towns, such as Manchester or Birmingham, which have not hitherto had any members of their own. But others were of opinion, that, instead of an act of favour, this would in

Note
(B.)

[202]

Note
(B.)

truth be an injury, as all the expence, dissipation, and dissensions, which are too often the attendants and consequences of elections, would be thereby introduced in the place of œconomy, sobriety, and industry. Another project was, to give the right of choosing two additional members to the freeholders of the county at large. The objection to this was, that it would be an innovation on the constitution, by altering the balance between the *provincial* and *municipal* representation: that such examples become dangerous precedents, and therefore ought to be avoided. A third scheme was, to give the right solely to the freeholders of the Hundred, but *that* was, in a degree, liable to the same objection; and, as every one of the three designs would have deprived the present unbribed electors of Hindon, and all succeeding inhabitants, of a very valuable franchise, which they had done nothing to forfeit, the proposal of a bill for an entire disfranchisement was rejected, and a clause was put into both the incapacitating bills, leaving the right of election as formerly, but communicating that right, jointly with the former, to a new class of electors. Who they were to be, was not filled up in either of the bills; however, as both were formed on the model of the New Shoreham act (11 George III. cap. 55), so most of those who supported them, were for following the provision of that act, in bestowing the joint right on the freeholders of forty shillings a year within the Hundred.

[203]

V.

THE

C A S E

Of the BOROUGH of

D O W N T O N,

In the County of WILTS.

The Committee was chosen on Friday, the 3d of January,
and consisted of the following Gentlemen :

Sir John Hynde Cotton, Bt. Chairman	} Members for	Cambridgeshire.
Richard Aldworth Neville, Esq. -		Grampound.
Charles Morgan, Esq. - - -		Breconshire.
Edward Roe Yeo, Esq. - - -		Coventry.
Sir George Robinson, Bart. - -		Northampton.
Hugh Owen, Esq. - - - -		Pembroke.
Lord Adam Gordon - - - -		Kincardineshire.
Lucy Knightley, Esq. - - - -		Northamptonshire
Rowland Holt, Esq. - - - -		Suffolk.
Edward Gibbon, Esq. - - - -		Leskeard.
Hon. Booth Grey - - - -		Leicester.
John Dodd, Esq. - - - -		Reading.
Joseph Bullock, Esq. - - - -		Wendover.

NOMINEES

Of the Petitioners :

Sir Richard Sutton, Bart. - - -	St. Alban's.
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Of the Sitting Members :

Fletcher Norton, Esq. - - -	Carlisle.
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PETITIONERS :

Sir Philip Hales, Bart. and John Cooper, Esq.
Certain Freeholders of the borough of Downton.

Sitting Members :

Thomas Duncombe, Esq. Thomas Dummer, Esq.

COUNSEL,

For Sir Philip Hales, and Mr. Cooper :

Mr. Mansfield, Mr. Lee.

For the Freeholders Petitioners :

Mr. Hardinge.

For the Sitting Members :

Mr. Serjeant Davy, Mr. Maddox.

T H E
C A S E
Of the B O R O U G H of
D O W N T O N.

ON Saturday, the 4th of February, the Committee being met, the petitions were read, setting forth ; That several persons were allowed to vote, at the last election of burgeses for this place, who had no right, by which means a pretended majority was procured in favour of Duncombe and Dummer, and they were returned, although the petitioners, Hales and Cooper, had a clear majority of legal votes (1).

In the petition of Hales and Cooper, there was likewise a charge of bribery against the sitting members ; but this not being insisted on before the Committee, the only question was, concerning the right of the different persons who had polled at the election to vote.

[208]

(1) Votes, 6 Dec. p. 19. 19 Dec. p. 97, 98.

There

There is no determination of the House of Commons, of the right of election in Downton.

The numbers on the poll, as produced by Edward Poore, Esq. the steward and returning officer, were :

For Mr. Duncombe	-	-	-	22
For Mr. Dummer	-	-	-	22
For Mr. Cooper	-	-	-	11
For Sir Philip Hales	-	-	-	10

The counsel for the sitting members, on the opening of the cause, would not admit any general rule as to the right of voting; but both sides, in their arguments, considered it to be, "In persons
" having a freehold interest in burgage tenements,
" holden by a certain rent, fealty, and suit of
" court, of the bishop of Winchester, who is lord
" of the borough, and paying reliefs on descent,
" and fines on alienation." *

The counsel for the petitioners objected to nineteen or twenty of the voters for the sitting members.

[209] One general objection, which applied to most of them, was Occasionality.

It was proved, that the conveyances to some were made in 1768, but that the deeds had remained ever since that time in the hands of Mr.

[* A farther discussion of p. 173. Of Clitheroe in 1781, the burgage tenure right of and Luggershall in 1791 (both election took place in the case inedited) and the case of of Downton, in 1784. 1 Lud. Horsham 1792. 2 Fras. p. 1.] p. 109, and in 1785. 3 Lud.

Dun-

Duncombe (who is proprietor of near two-thirds of the burgage tenements in Downton;) that the occupiers had continued to pay their rents to him, and expected to do so when they became due again, considering him as their landlord, and being unacquainted with the grants made by him to the voters; and that there were no entries on the court-rolls of 1768, of those conveyances, nor of the payment of the alienation fines.

The conveyances to others appeared to have been *printed* at the expence of Mr. Duncombe, and executed after the writ and precept had issued, some of them being brought wet to the poll. The grantees did not know where the lands contained in them lay, and one man at the poll produced a grant for which he claimed a vote, which, on examination, appeared to be made to another person.

Mr. Duncombe, at the poll, forbid the voters to answer any questions about their conveyances. [210] The consideration in them all was five shillings. The rent twenty shillings a year. They were, by lease and release, for life, with a clause of re-entry, if the grantee should assign without the consent of the grantor.

It appeared, that the practice of making such conveyances about the time of an election, had long prevailed in the borough, and that the votes so made, are known by the name of *faggots*. Mr. Poore, the returning officer, and father-in-law to the petitioner Cooper, and Mr. Hayes (formerly member

member for Downton) declared, that they had always considered those *faggots* as bad votes. Mr. Poore acknowledged that on a former occasion he had, to oblige Lord Feverham, then proprietor of great part of the borough, voted under one of those conveyances, but he said he had, to him, expressed his doubts of the legality of such votes. He has been returning officer ever since 1745. A witness [211] (one John Quinton) aged 78, remembered a contested election 47 years ago, when *faggots* were polled on both sides, but there was no petition then; nor in 1747, when the only contest happened which (till that before the Committee) has been in Downton for 30 years past. Then, too, *faggots* were polled on both sides.

Mr. Poore said, that, since he had known the borough, the person who had the prevailing interest and property there, and was therefore sure of a majority of undeniable votes, had always, at the time of an election, a number of those *faggots* ready, to provide against any attack, upon that ground, from another quarter.

Such being the substance of the evidence upon this head, it was contended, for the petitioners,

That the votes in question, were colourable, fraudulent, and void, both by the common law of Parliament, and the statute of William III. commonly called the *splitting act*.

They argued as follows:

[212] The *statutes* against occasional freeholders in
 3 counties

counties (1), and in boroughs that are counties of themselves (2), and against occasional freemen (3), do not make any express provision concerning burgage tenure boroughs; but that votes plainly fraudulent, and occasional, are bad by *the common law of Parliament*, is evinced by a variety of cases. In the very case which gave rise to the statute against occasional freemen, the House, before the statute passed, determined all the new votes to be bad (4); and in that of Stafford, 4 February 172 $\frac{4}{5}$, the House resolved,

“ That persons made burgeses of the borough
 “ of Stafford, in the county of Stafford, since the
 “ death of John Dolphin, Esq. late member of
 “ Parliament for the said borough, not being sons
 “ of burgeses, or not having served seven years
 “ apprenticeship within the said borough, had not [213]
 “ a right to vote in the late election of a burges
 “ to serve in this present Parliament for the said
 “ borough (5).”

In like manner in the case of Wareham, 19 January 174 $\frac{7}{8}$ (6), (after the two statutes against the votes of occasional freeholders for counties, and boroughs that are counties of themselves,) the House determined the right of election to be as follows:

(1) 18 Geo. II. cap. 18. § 3. (5) Journ. vol. xx. p. 391.

(2) 19 Geo. II. cap. 28. col. 2.

(3) 3 Geo. III. cap. 15. (6) Journ. vol. xxv. p. 481.

(4) Journ. vol. xxix. p. 337. col. 2.
 col. 2.

“ Resolved,

“ Resolved, That the right of election of bur-
 “ gesses to serve in Parliament for the borough of
 “ Wareham, in the county of Dorset, is only in
 “ the mayor and magistrates of the said borough,
 “ and in such of the inhabitants of the said borough
 “ as pay scot and lot, and in the freeholders of
 “ lands and tenements there, who have been, *bond*
 “ *fide*, to their own use, in the actual occupation,
 “ or in the receipt of the rents and profits, of such
 [214] “ lands or tenements, for the space of *one whole*
 “ *year next before the election*, except the same came
 “ to such freeholders by descent, devise, marriage,
 “ marriage-settlement, or promotion to some be-
 “ nefice in the church (A).”

Nay there was no particular limitation to occa-
 sionality at common law. Votes clearly fraudulent,
 and made merely for the purpose of an election,
 were bad, though of a date more than a year an-
 terior to the election. This appears from the case
 of Weymouth, and Melcombe Regis, 3 June,
 1714, where votes of *three years* standing, being oc-
 casional, were determined to be void (1). If that
 period is fixed by the statutes just mentioned, they
 are to be construed to mean that persons claiming
 to vote, who have become freeholders or freemen
 within the year, shall be presumed and holden to
 have become so for the purpose of the election,
 without enquiry, and their votes rejected; but
 they do not preclude an enquiry into the fraudu-
 lency or occasionality of votes, though of more

(1) Journ. vol. xvii. p. 665. Haslemere, *infra*.
 col. 2. *Vide* the Case of

than a year's standing. Be this however as it may, with regard to the species of votes which are the direct objects of those statutes, such votes as are not mentioned in them, as votes for burgage tenures, must continue subject to the same objections as formerly. They may be occasional, though not mentioned in those statutes, because occasionality has been proved to exist independent of the statutes. Perhaps occasionality and fraud are to be *presumed* without enquiry, even with regard to them, when they have been made within the year, by an analogy to the provision of the 3d of George III. against occasional freemen, similar to the analogy to the statute of the 19th of George II. which the House seems to have followed in their decision in the abovementioned case of Wareham. But certainly, if they are clearly *proved* to be fraudulent, they will be void, though of a date more than a year preceding the election. Upon the whole, it being proved that the conveyances in question, carried no beneficial interest; that they were neither followed by possession of the estates, or even of the deeds; (and it is laid down in Levinz, p. 146, that the continuance of the grantor, in possession, is a badge of fraud), nor by attornment of the occupiers; and, that no act of ownership whatever has been exercised by the grantees, both the votes under the conveyances of 1768, and those immediately preceding the last election, as well as the conveyances themselves, are fraudulent and void. Indeed, nothing but a consciousness of the

[216]

fraud could have induced Mr. Duncombe to forbid the voters to answer any questions relating to their conveyances. To the last class, there is another objection.—The writ of election, and precept, can only have in view those electors who exist at the time when they issue; and therefore voters, whose titles accrue afterwards, cannot exercise their right at that election (1).

That those votes were bad, by the statute of king William, will appear from examining the seventh section of that statute (2), which is as follows:

[217] “ All conveyances of any messuages, lands, tenements, or hereditaments, in any county, city, borough, town corporate, port, or place, in order to *multiply* voices, or to split and divide the interest in any houses or lands, among several persons, to enable them to vote at elections of members to serve in Parliament, are hereby declared to be void and of none effect, and no more than one single voice shall be admitted for one and the same house or tenement.”

It has been shewn, that the conveyances in question were made *in order to multiply voices*; they are therefore void by the statute, and the votes claimed under them must *a fortiori* be void.

Besides the general objection of occasionality, fourteen of the votes for the sitting members were

(1) See the case of Bristol, *infra*. (2) 7 and 8 Will. III. cap. 25, § 7.

impeached for reasons drawn from the nature of burgage tenements.

They defined a burgage to be “one undivided
“and indivisible tenement, clearly described,
“neither created, nor capable of being created, [218]
“within time of memory, which has immemorially
“given a right of voting.”

It appeared that, in the borough of Downton, there are burgages, which have been immemorially distinct tenements giving a right to vote, known by the different names of *burgages*, *half-burgages*, and *quarters of burgages*. That the rent which has always been paid to the lord for a whole burgage is one shilling, for half a burgage six-pence, and for a quarter of a burgage three-pence. That a *quarter of a burgage*, or *half a burgage*, are technical terms, and not expressive of the fourth parts, or the halves of whole burgages, but of distinct and separate tenements of various extent, and apparently only so called because the quit-rents they pay to the lord are halves or quarters of what whole burgages pay. By the pipe-roll of 1458, the amount of all the burgages in the borough is stated to be 126 and three quarters, and the rent 6l. 6s. 2d. (There must be a small mistake here. It should be 6l. 6s. 9d.—) There is an old book of precedents and forms for holding the court for the borough, where the burgages are stated at 127 and three quarters. And by a presentment of the jury of 1677, the number is 120 and three quarters; which, if we suppose the (o) to have been written by mistake instead of (6) will correspond with the [219]

pipe-roll. There are court books existing from the 11th of James the first, to the 6th of Charles the first, and from the 13th of Charles the second, to the present time. In these, all the entries from the 11th of James the first, to the 28th of Charles the second, are of burgages, half-burgages, or quarters of burgages. After that date, there are entries of tenements some fractions above a half or a quarter, as of $\frac{5}{12}$ ths; the rent 7d. and of $\frac{2}{3}$ d. the rent 4d. but of none under a quarter.

[220] Six of those who voted for the sitting members claimed under conveyances from Mr. Duncombe, each of a quarter of a burgage of land, in what is called Legg's Farm.—It appeared that Legg's Farm is entered in the court-books as paying ten shillings rent to the lord; it must therefore have constituted ten of the ancient whole burgages; but no traces could be shown of any part of it having formerly consisted of quarter burgages. It came in its present form, by mesne assignments, from one Mr. Legg to the Duncombe family; and no boundaries or divisions can now be discovered separating it, even into distinct whole burgages. No attempt to divide it into quarters can be found before 1708.

Four voted under conveyances of quarters of burgages of land in Butt's Close, a piece of ground paying four shillings rent, and therefore consisting of four whole burgages.—This came entire to the Duncombe family in 1700, and there are

are no houses, or divisions of the land, into distinct tenements.

One voted for a quarter of a burgage of land in Farr's Farm.—This, consisting of five burgages and a half of land, was sold by one Farr to Mr. Duncombe's family, 21 of April, 1708, and there is paid for it five shillings and six-pence. There are no divisions in this land.

One voted for a quarter of a burgage of land in Dawe's Farm.—This was sold in 1708 by one Dawe to the Duncombe family, as two burgages; it pays two shillings. There is no trace of its having ever contained ancient distinct quarters of burgages. [221]

Two persons, of the name of Eyre, voted for a tenement which is under one roof, and pays only six-pence. Before it came into their hands this tenement belonged to one Wyche, an attorney at Salisbury; and, though two families lived in it in his time, there was never more than one vote given for it.

From this evidence the counsel for the petitioners contended,

That these fourteen votes, not being for ancient quarters of burgages carrying immemorially a right of voting, but for quarters of burgages attempted to be newly carved out of larger tenements, and so ill described in the conveyances that it would be impossible to say what part of those larger tenements passed, must, according to the nature of burgage tenure votes, be bad, and ought to be re-

jected; that, as to the votes of the two Eyres, their tenement had never before been understood to carry two votes; that if it had, it is improbable a man of Wyche's profession would have suffered one of them to lie dormant.

The vote of one Rose was objected to, because the property was without the borough, and this vote was given up by the other side.

On the part of the sitting members the facts which were proved by the witnesses called by the petitioners, were not disputed; but it was contended for them, in answer to the objections of fraud, and occasionality,

That all the conveyances were good, and had passed the property to the grantees, and therefore had carried the right of voting to those grantees. They said:

[223] Mr. Duncombe's advice to the voters not to answer any questions, proves nothing: they were not obliged to answer any, If the grantees had at any time demanded the deeds of Mr. Duncombe, and he had refused them, they could have maintained an action of *trover* for them. The Chancellor, if a bill were filed, would compel a delivery of them. They might have taken possession of the land, or have brought ejectments. They might now recover the profits which have been perceived by Mr. Duncombe, in actions *for money had and received to their use*. The validity of such grants as against the grantor, was determined by the present Chief Justice of England,

in

in the case of the assignees of Metivier, a bankrupt, against Devisme. There, though the defendant had made a transfer to the bankrupt of India stock merely for the purpose of making a vote, it was holden that the assignees were entitled to the stock. But it is said, that those conveyances are fraudulent, as against the other voters of the borough,—as against the petitioners; and that the votes are occasional and void. This has not been proved by any parallel case of burgage tenure votes. The practice has prevailed, for a long course of years, in this borough, of making such votes, and till now has never been called in question. Fraud is where the parties pretend to do something, which in fact they do not: that is not the case here. Nothing which by law a man has a right to do, can be said to be fraudulent. If those conveyances were to be called a fraud on the other electors, it might as well be said, that the suffering a common recovery, by a tenant in tail, is a fraud on the donor. Why did not the legislature, when they made statutes, first against occasional freeholders in counties, then against such freeholders in boroughs that are counties, and lastly against occasional freemen, extend the same provision to burgage tenures? It cannot be said that they were overlooked. There are about twenty-nine burgage tenure boroughs in England. Is it not evident that they were purposely omitted in those statutes? And as to the idea that the statutes were only cumulative, and in affirmance of the common law, there is not a word in any of

[224]

them that can support such an opinion. Neither is there any law which makes a distinction between conveyances before and after the issuing of the writ.

Those votes cannot be said to be affected by the statute of the 7th and 8th of King William, since it appears that the number of burgages in Downton, has not been increased since 1458; so that there has been no multiplying of voices on the present occasion.

The particular objection to the votes for Legg's and Butt's, Farr's and Dawe's land, and to those of the two Eyres, is that they were not given for ancient distinct tenements. But if it should be thought that quarters of burgages carrying a right to vote, could not now be granted out of Legg's and the other farms, will it follow that nothing was granted? The purpose was to grant that property which would carry a vote; and, therefore, though misdescribed in the deeds, and called a quarter of a burgage, a whole burgage passed. In Rolle's Abridgement, (Title Graunts) (1) it is laid down:

[226] " That if one lease to another, the meadows in D
 " and S, containing ten acres, and, in truth, the
 " meadows in D and S, contain twenty acres, still
 " all the twenty acres shall pass." Each of those farms contain more whole burgages than there are conveyances for them; therefore there have not been more votes carved out of them than they will bear; for there might be ten, instead of six votes

for Legg's Farm, and so, proportionally, of the others.—It is said there are no boundaries to distinguish those different burgages, but if a man grant an acre of land in a field, the whole of which belongs to him, the grantee may take an acre where he will in the field.

As to the votes of the two Eyres, their conveyances are of different premises, which have been long two distinct dwellings ; and there is no proof that there were never two votes given for them.

After having thus endeavoured to answer the arguments of the counsel for the petitioners, they proceeded to impeach two of their votes, viz. those of two brothers, John and George Ruffel. [227]

The amount of the evidence concerning them was, that before 1713, two persons, called Roger Plasket, and John Ruffel, having married two sisters, each of them had a separate house, in right of their wives — When Plasket died, his house came to Ruffel. He was father to the present Ruffels.— At his death, both Houses descended to John, the elder brother ; and he, by a deed of the year 1744, made over one of them to his brother George, who has lived at a distance from Downton, in the Isle of Wight, ever since 1746 ; so that, of late, only one vote has been given for both houses. In the entries, in the books of the borough, those two houses are always specified as one tenement, paying seven-pence rent, sometimes in the name of John, and sometimes of John and George Ruffel. A return was produced of the year 1713, and another of

1726,

1726, signed by Roger Plasket, and John Ruffel; and several old witnesses swore that the houses are reputed to carry two votes.

From these facts it was contended, that this was but one tenement; that the two names to the indentures of return proved nothing, because returns may be signed by persons as witnesses, who are not electors or parties to those returns; that, in short, those two votes were liable to the same objections with those of the Eyres.

COUNSEL for the Petitioners in reply.

[229] It is not true that the votes called *faggots* are now objected to for the first time, as it appears by the Journals of 3d July 1661 (B); that such votes were objected to, in this borough, at that time. It is not material, in the present case, to consider how far the circumstances of their being made after the issuing of the writ and precept, avoided the conveyances and the votes made in 1774, as the petitioners will have a majority without them. It is far from being certain that the grantees of 1768 could recover possession of the estates, the deeds, or the rents and profits, from Mr. Duncombe; but, if they might, still it clearly was never the intent of the parties that they should: the grantees only thinking they acquired, and the grantor only meaning to pass, a right to vote; and from the intent, the fraud must be gathered. Those conveyances come within the definition of *fraud* given on the other side, for they purport to do,

do, what in fact they were not meant to do. If it be true that the conveyances are good as between the parties, it does not follow that they are good in such manner as to affect the interests of third persons. Transactions that are valid between the parties privy to them, may be fraudulent and void as against others. Thus, goods delivered by one person to another, may still continue the property of the first, as between him and the bailee, and yet the creditors of the bailee may seize them in execution; for it is fraud upon third persons to give a false appearance of property which may procure an additional credit, to which the party's real circumstances would not entitle him. To suffer a recovery in order to bar an entail cannot be a fraud on the donor, for this reason, that he must be presumed to know that he granted a defeasible estate. [230]

It is doubtful how far different votes could now be made out of Legg's Farm, or the others, by conveyances of whole burgages, because it is impossible to trace the ancient boundaries of the separate burgages of which they are composed. It is said, that if one grant an acre of land in a field which belongs entirely to him, the grantee may take any acre in the field which he chuses. True; but how shall a grantee of a burgage in Legg's Farm, separate his burgage from the rest? A burgage is not of a known measurable extent, like an acre, and there are now no means of ascertaining what part of the whole farm one burgage makes.

But,

But, however this may be, it never can be holden, that a whole burgage passed by those grants. In the case of the meadows, cited from Rolle's Abridgement, the whole meadows in D. and S. were leased in express terms, and the subsequent words merely showed the lessor's idea of their extent, in which he happened to be mistaken; but, in the present case, the only words descriptive of the thing conveyed were, "*one quarter of a burgage*," which could never mean a whole burgage. What relief would the grantees pay? Certainly only three-pence. What rent? Three-pence; and (on alienation) the fine for a quarter, not that for a whole burgage. Nobody can say, that, if those grants are good, Mr. Duncombe could not in like manner have carved forty quarters of burgages out of Legg's farm.

[232] The objection to the votes of the two Ruffels rests on much weaker ground than that to those of the Eyres. Returns have been produced more than sixty years back to which the names of the proprietors of both the Ruffels' houses appear; and it is always to be presumed, that an indenture of return is signed only by voters, for they only are necessarily present at the election. Besides, stronger evidence cannot be given. The poll-books of borough-elections are rarely printed, or preserved, and, in this case, no polls of those years have been found. Two votes, therefore, have been given for the Ruffells' houses, for a space of time, equal to what is sufficient, by law, to secure property in lands,

lands, against any claim whatsoever. In the case of the Eyres, the claim of two votes is only an innovation of a few years standing.

Upon the whole, if the votes of the Ruffels should be holden by the Committee to be good, the votes of the petitioners would stand as on the poll, viz. eleven, and ten.—If they were rejected, nine, and eight.

If the objection of fraud and occasionality should be adopted by the Committee, the petitioners must have a great majority. But, although it should not, still, on the other grounds, the votes of the fitting members must be reduced to seven, or, if the Eyres votes were allowed, which could not [233] be without allowing those of the Ruffels likewise, to nine. So that in all events, one of the petitioners must have a majority of two, and the other of one, over the fitting members.

The counsel finished on Saturday, the 11th of February.

On Monday, the 13th of February, the Chairman of the Committee reported to the House, that the Committee having met that day, at half an hour after one o'clock, pursuant to their adjournment of the Saturday preceding, and the honourable Booth Grey, one of the members, not attending, they had adjourned till the morning following, twelve o'clock. At the same time he informed the House, that he had that day received a letter from Mr. Grey, which being delivered
in

in at the table, and evidence being given to the House that it was of the hand-writing of Mr. Grey, and the letter being read, and the Chairman of the Committee informing the House, that the evidence and arguments of counsel on both sides [234] were finished, but that the Committee had not yet come to any determination; it was ordered, that Mr. Grey should be discharged from farther attendance on the Committee, and that the Committee should proceed on the morning following, according to their adjournment, notwithstanding Mr. Grey's absence. Then, on the information of a member that Mr. Grey was in the country at too great a distance for an order to reach him in time for his attendance the next day, an order was made for his attendance in his place on Friday (1). However, the next day, (Tuesday the 14th of February) Mr. Grey being returned, and having, in his place, informed the House, that he was very sorry that his absenting himself from the Committee, had given the House any trouble, but that the business, on which he was obliged to go into the country, was urgent, and indispensable, the order for his attendance on Friday was discharged (2).

[235] On Tuesday, the 14th of February, the Chairman informed the House that the Committee had determined,

“ That Thomas Duncombe, Esq. is not duly
 “ elected a burghess, to serve in this present Par-

(1) Votes, p. 209, 210.

(2) *Ibid.* p. 218.

“ liament,

“ liament, for the borough of Downton, in the
 “ county of Wilts :

“ That Thomas Dummer, Esq. is not duly
 “ elected a burges, to serve in this present Parlia-
 “ ment, for the borough of Downton, in the
 “ county of Wilts :

“ That Sir Philip Hales, Baronet, the petiti-
 “ oner, ought to have been returned a burges, to
 “ serve in this present Parliament, for the borough
 “ of Downton, in the county of Wilts :

“ That the said Sir Philip Hales, Baronet, is
 “ duly elected a burges, to serve in this present
 “ Parliament, for the said borough of Downton :

“ That John Cooper, Esq. the petitioner,
 “ ought to have been returned a burges, to serve
 “ in this present Parliament, for the borough of
 “ Downton, in the county of Wilts :

“ That the said John Cooper, Esq. is duly [236]
 “ elected a burges, to serve in this present Parlia-
 “ ment, for the said borough of Downton.”

These determinations were ordered to be entered
 in the Journals, and the return to be amended the
 day following (1), which was accordingly done (2).

(1) Votes, p. 216.

(2) *Ibid.* p. 223.

N O T E S

ON THE CASE OF

D O W N T O N.

Note
(A.)

PAGE 214. (A.) Neither the Durham case in 1762, nor the cases of Plympton and Ipswich, which were then cited, are exactly in point, as to occasionality at common law.

In the latter, the objection was not occasionality, but that the freemen had not been made according to the constitution of the place, 1 April, 1714. Journ. vol. xvii. p. 528. col. 2.

In the case of Plympton, 28 Jan. 170²/₃. It having appeared by the report of the Committee, that several honorary freemen had been elected by the magistrates, immediately preceding the election of the members of Parliament, and that the right of the magistrates to elect such honorary freemen not having a previous title was disputed, the House resolved, " That the proceeding of the mayor and corporation of the borough of Plympton, in the county of Devon, in making freemen, after the death of his late Majesty, to vote at the last election, was illegal, " and contrary to the rights of the said corporation; " and that those freemen then *pretended* to be made, " have not thereby obtained any right to vote, upon that " account,

“ account, in any future elections.” Journ. vol. xiv. p. 151. col. 1.

Note
(A.)

Although, from the mention of the death of the late king, as the period from which the bad votes were to be dated, it would seem that the House had occasionality in their view, yet we must suppose that, when they declared the freemen made after that time to be only *pretended* freemen, and who had not acquired a right to vote at any subsequent election, they must have considered them as illegally admitted to their freedom.

In the case of Durham, 215 freemen were made just before the election, and 93 of those, were sworn in, on, or after, the day of the teste. But, besides that circumstance, they were objected to as being made contrary to the constitution of the city. The House resolved, 11 May, 1762, “ That the 215 persons made, or *pretended* to be made, “ free of the city of Durham, since the death of Henry “ Lambton, Esq. late member of Parliament for the said “ city, had not a right to vote in the late election of a citizen to serve in Parliament for the said city.” Journ. vol. xxix. p. 332. col. 1, 2. p. 337. col. 2.

P. 228. (B.) The entry in the Journals of the 3d of July, 1661, is this,

Note
(B.)

“ Serjeant Charleton reports, from the Committee of “ privileges, and elections, touching the election for the borough of Downton, that the question was, whether the “ out-livers that have freeholds, but no houses, within “ the borough, had voices, and the opinion of the Committee that they had voices; and that Mr. Elliot, and “ Mr. Eyre had the major voices; and were duly elected, “ and ought to sit. But some members insisting, that divers inconsiderable freeholders were fraudulently created; “ whereby the said Mr. Elliot and Mr. Eyre obtained the “ majority of voices; concerning which some of the evi-

[239]

VOL. I.

N

“ dence

Note
(B.)

“ dence was not heard;—The question was put, That this
“ House doth agree with the Committee: Whereupon the
“ House was divided—Noes 109—Yeas 108; so it passed
“ in the negative. Ordered, that the same be re-commit-
“ ted, to the said Committee, fully to examine the said point
“ of fraud.” Journ. vol. viii. p. 288. col. 2.

But nothing further appears on the Journals concerning
this matter.

VI.

THE

C A S E

OF THE

CITY and COUNTY

OF THE

CITY of BRISTOL.

The Committee was chosen on Friday, the 10th of February, and consisted of the following Gentlemen:

Right Hon. George Rice, Chairman	} Members for	Carmarthenshire.
Sir Richard Worsley, Bart. - -		Newport, Hants.
Nathaniel Polhill, Esq. - - -		Southwark.
Sir Harbord Harbord, Bart. - -		Norwich.
Sir Thomas Miller, Bart. - - -		Lewes.
Hon. Charles Finch - - - -		Castle-Rising.
Hon. Simon Frazer - - - -		Invernesshire.
Henry Herbert, Esq. - - - -		Wilton.
Walter Waring, Esq. - - - -		Coventry.
John Buller, Esq. - - - -		Launceston.
Richard Milles, Esq. - - - -		Canterbury.
Thomas Knight, Esq. - - - -		Kent.
Charles Penruddocke, Esq. - -		Wiltshire.
N O M I N E E S.		
Sir Edward Aftley, Bart. - - -	} Members for	Norfolk.
Edward Bacon, Esq. - - - -		Norwich.

P E T I T I O N E R S :

Matthew Brickdale, Esq.

Certain Freeholders and free Burgesses of the City and County of the City of Bristol.

Sitting Members :

Henry Cruger, the younger, Esq. Edmund Burke, Esq.

Counsel for the Petitioners :

Mr. Mansfield, Mr. Hobhouse.

For Mr. Cruger :

Mr. Bearcroft, Mr. Buller.

For Mr. Burke :

Mr. Lee, Mr. Wilson.

THE
C A S E

Of the CITY and COUNTY of the

CITY of BRISTOL.

ON Saturday, the 11th of February, the Committee being met, the two petitions were read, setting forth; That the election was holden on the 7th of October, and that, *at the election*, the petitioner Mr. Brickdale, together with Robert Craggs Lord Viscount Clare of the kingdom of Ireland, and Henry Cruger the younger, Esq. and no other persons, were candidates; that a poll was *then* demanded for each of the three candidates, proceeded upon, and adjourned to the following day; that, on the succeeding day, (the 8th of October) Lord Clare declined proceeding on the poll; and that Mr. Brickdale the petitioner, having on that day a majority of votes, [244] ought to have been declared duly elected, and to

have been returned ; but, that Edmund Burke, Esq. was, on the same day, (the 8th of October) first named a candidate ; that the sheriffs, afterwards, on the 10th of October, and not before, unjustly and illegally awarded a poll to be taken for Mr. Burke, notwithstanding the protestation of Mr. Brickdale, and many of the electors, to the contrary.

That, in order to influence the election, great numbers of persons were admitted to the freedom of the city, after the date, and issuing forth of the writ ; and that they were illegally admitted, by the sheriffs, to poll for Mr. Burke, and Mr. Cruger, contrary to the ancient usages and customs of the city.

That divers persons, not legally admitted to their freedom, nor having any right to vote, were admitted to poll for Mr. Burke, and Mr. Cruger.

[245] That Mr. Burke, and Mr. Cruger, by themselves, and their agents, and others, by their privacy, and direction, before and during the poll, were guilty of bribery.

And that, by all those means, Mr. Burke, and Mr. Cruger obtained a pretended majority, and were returned ; whereas Mr. Brickdale was duly elected, and ought to have been returned.

From the allegations just stated, it appears that there were several questions in this case.

I. Whether a person may be elected, who becomes a candidate on a day subsequent to that on which

which the election was appointed to be holden, and on which the poll commenced.

II. Whether persons admitted to the freedom of the city of Bristol, after the date and issuing of the writ for an election of members of Parliament for that city, have a right to vote at such election.

☞ There is a general allegation, respecting illegal freemen, and voters; but, on the trial of the case, no other objection was gone upon, but that to the votes of freemen made after the teste of the writ.

III. Whether Mr. Burke, and Mr. Cruger, or [246] either of them, were guilty of bribery.

At the request of the counsel for the petitioners, and for Mr. Cruger, the Committee resolved to proceed upon, and determine, the first question, before they should go into the rest of the case.

The facts on this head were as alleged in the petitions. One of the sheriffs proved, that when Mr. Burke was nominated, on the second day of the poll, which was Saturday, they continued the poll till Brickdale and Cruger had a majority over Lord Clare, and then adjourned it till the Monday following, in order to take the opinion of the recorder of Bristol; and that his opinion was in favour of Burke's admissibility to be a candidate.

The arguments for the petitioners were, in substance, as follows:

The election is, in the eye of the law, completed on the first day. The sound of voices, or the shew of

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247 hands on the view, is, in truth, the election; and the poll, if it be demanded, is only a method of ascertaining who has already been elected by the majority of voices.

No writ, or statute, warrants the opinion that the poll is the election. On the contrary, by the statute of the 7th of Henry the Fourth, cap. 15. it is enacted, "That, on the day appointed by that Act, all they *that be there present*, shall attend to, and proceed to the election;" and, in like manner the writ directs, "That the election shall be made by *those present* at the proclamation (1)." Is it not therefore evident, that both the statute, and the writ, understand the election to be made on the day when the proclamation is made? And if so, a candidate, who appears after that day comes too late, and can no more be chosen, than if he were to come after the poll is closed, and the return executed.

[248] Whitelock (2) in commenting on these words of the writ, "*Those who shall be present at such election*," says, "That, though practice warrants the admitting voters to give their voice on the poll, who were not present at the proclamation for the election, the words of the statute, and of the writ, seem to be against it." But there is no practice, no precedent, to warrant the ad-

(1) The words of the writ to the sheriff of a county corporate are, in this respect, the same with those of the writ to the sheriff of a common county; for which see *infra*, Case of Abingdon, note (A.)

(2) Parl. Writ. vol. ii. p. 25.

mission of a candidate after the first day, and the words both of the statute and writ have been shown to be against such admission. Sir Edward Coke considers the poll, not as the election, but as a mere numeration of the votes which had been given at the election, in order to discover, with certainty, which of the candidates had the majority. He therefore makes no distinction between a poll and a scrutiny—His words are, (1) “For the election of knights, if the party, or the freeholders, demand the *poll*, the sheriff cannot deny the *scrutiny*, for he cannot discern who be freeholders by the view; and, though the party would wave the poll, yet the sheriff must proceed in the scrutiny.” In the case of an action of debt on a false return, reported in Plowden’s Commentaries, all the judges seem to have treated the poll as distinct from the election (2). [249]

Many inconveniencies would attend the admission of candidates at any advanced stage of the poll. For instance: suppose there are three candidates nominated at the beginning of an election, and certain electors give only single votes for one of the candidates, not being anxious which of the other two shall be their second member; if, a day or two afterwards, a new candidate could be received, though those electors might prefer either of the other two to him; and though they may be so numerous, that if they had known of him,

(1) 4 Instit. p. 48.

(2) Plowden’s Comm. p. 118. and *infra*.

when

when they gave their voices singly, they might, by giving second votes to one of the other two, have effectually excluded him; yet, as they cannot vote again, this new comer may be chosen and returned, contrary to the sense and inclinations of the majority of the voters (1).

On the part of Mr. Burke, it was argued;

That in order to be elected it cannot be necessary for a man to be nominated, or to declare himself a candidate, that being a term of no determined signification in the law.

In a case determined in the court of King's Bench, Lord Mansfield said, "*Candidate*" is a "vague term. No certain idea is fixed by law to it; surely asking a vote for a man is enough to make him a candidate (2)."

So far from its being necessary to become a candidate, a man may be chosen and returned without his consent, and against his will. This is proved by the case of the county of Gloucester, reported by Glanville (3); for there the Committee, and the House, determined (9 April, 1624) that Sir Thomas Estcourt, having had a majority of votes on the poll, was duly elected, and returned, although he had declared at the election, that he desired not to be chosen (4) (A).

If, to be chosen, neither the declaration nor assent of the party is necessary, it must follow that

(1) See *infra*, note (B.)

(3) P. 99.

(2) Combe v. Pitt 3 Burr.

(4) Journ. vol. i. p. 759.

p. 1590.

col. 1.

voices may be given for any man lawfully qualified to be elected, at any time before the end of the poll. That voters, not present at the nomination, nor on the first day, may still give their voices, was admitted by the counsel on the other side, and is proved to be unquestionable by the constant practice, as well as by the determinations in the case of Gloucester just cited, and in that of Arundel in the same author (1). Can it then be contended, that such persons have still a right to vote, but that, whereas those who were present the first day, and at the commencement of the poll, might have voted for any man in the kingdom qualified to sit in Parliament, and each for a different person, they, on the contrary, must vote for one or other of two or three people, proposed on that day, or else not at all? [252]

Where the law seems to consider the election as happening on the first day, it is only by relation, and legal fiction; as the term in Westminster-hall, and the whole session of Parliament, are considered as one day. The statute of the 7th of Henry the Fourth was made against the partiality of sheriffs, who used to summon only whom they pleased, and to admit the votes only of those so summoned. It therefore enacted, that not merely a partial number of electors, as formerly, but that all present should vote at the election. Shall a statute whose object was to extend, be so construed as to narrow the right of election?

(1) Glanv. p. 71. Journ. vol. i. p. 748. col. 1. 24 March 1624.

There

There can be nothing inferred from what has been cited from Whitelock. In another part of the same work, it is plain that he understands the words "*those present*" to be used in contradistinction to, and to the exclusion of, votes by proxy.

[253] "Elections," says he, "cannot be made but by "the *personal presence* of the electors, yet suffrages, "in councils, are sometimes admitted to be by "proxies (1)." There is great inaccuracy in the passage of Lord Coke's fourth Institute, which has been relied on. He there confounds the *poll* with the *scrutiny*, although they are two very distinct things. In every place, the returning officer must grant a poll, if demanded, but it is at his discretion to grant a scrutiny, unless in the particular case of the city of London, where, by statute (2), it must be granted, if demanded. Nothing in Plowden's Report of the case quoted by the counsel for the petitioners, will support their doctrine; but if any thing there should be thought to favour it, little stress will be laid on what is put in the mouths of the judges, relating to the law of Parliament, in a case where one of them is made to say, "That the House of Commons never de-

[254] "termines any question by poll (3)," when, in truth, every question, on which there is a division of the House, is so determined.

But the Statute-book will best show the sense of the legislature on this subject. From a review

(1) Vol. I. p. 390.

(3) Plowd. Comm. *loc. cit.*

(2) 11 Geo. I. cap. 18. § 4. p. 126.

of the acts of Parliament concerning elections, it will be seen, that the *election* and the *poll* are used in those acts interchangeably, as synonymous expressions. Thus by the 7th and 8th of William III. cap. 25. sect. 3. and 5. it is enacted, "That in case the election shall not be determined upon the view, but a poll shall be required, the sheriff shall forthwith proceed to take the *poll*, and shall not, by any unnecessary adjournment, protract the *election*, but shall duly proceed, from day to day." By the 10th of Anne, cap. 23. sect. 5. "The sheriff, or returning officer must *within 20 days* after the *election* deliver over, upon oath to the clerk of the peace, all the poll-books of such election, without any al- [255] teration." Does *election* there mean only what passes on the first day, or before the beginning of the poll? Impossible. In counties where the number of freeholders is sometimes very great, elections frequently last several weeks, and the legislature could never intend to enact, that the poll-books should be delivered up before the poll was concluded. By the freeholder's oath, 18th of George II. cap. 18. every freeholder is to swear, "That he has not been *polled* before at that *election*." If the *poll* is not the *election*, but merely a scrutiny, a man might safely vote every day, notwithstanding his having taken the oath. Indeed, he could not be *polled* at the *election*, and the words of the oath would be unintelligible.

If there were no cases in point to be found, *that*
would

would only prove that the objection now made to the election of Mr. Burke, had never been thought of before. But there are cases in favour of Mr. Burke. It appears by the Arundel case, reported [256] by Glanville, that the two members may be chosen at different times, one first, without any nomination of the other, and afterwards a poll be taken for the other, between two new candidates; and the House resolved in that case, that at this choice of the second member, the electors might have voted for either of the two declared candidates, “or for any other (1).” In the case of Montgomery, 17th January, 170 $\frac{5}{6}$, one of the points for Vaughan the petitioner was, that there had been a *surprize* in Mason the sitting member’s appearing as a candidate. It was proved that it was not known that Mr. Mason intended to stand candidate, nor that he had appeared in the town, until they had actually begun the election; then one Mr. Powell demanded a poll for Mr. Mason, and Mr. Mason himself appeared as a candidate; and, upon a poll there were for Mr. Mason 41; for Vaughan 30. The house resolved, that Mason was duly elected [257] (2). If a candidate can appear after the beginning of the poll, when what is contended to be the election is over, though on the same day, one may as well appear on any subsequent day, while the poll continues, that is, in the words of Glanville (3), “While the election is still in hand, and un-

(1) Glanv. p. 74.

(3) *Loc. cit.*

(2) Journ. vol. xv. p. 94, 95.

“finished;”

“ finished ;” for no reason can be given why a person appearing on the first day, but after the commencement of the poll, shall be still eligible, and one who appears on any future day of the poll, shall not ; and, in the case of Beccalston, 28 April, 1640, the House held the election of a Mr. Harris good, although eleven days had intervened between that, and the election of the other member ; the other having been chosen on the 16th of March, and Mr. Harris not till the 27th, and not having appeared as a candidate on the 17th (2). (B).

Arguments *ab inconvenienti* are, and ought to be of weight, in guiding us to the true interpretation of the law where it is doubtful, since it should not [258] be so construed as to lead to absurdity, or injustice. But the inconvenience suggested by the counsel on the other side is, in fact, none ; for why should not the voters in the case put, exercise their franchise completely at first ? They may give their second vote for whomsoever they please ; and if they do not, they will only have themselves to blame, and they will lose one of their votes, in the same manner as they would both, if they should not attend the election at all.

But a real inconvenience, and a very serious one, would arise, if the law stood as the counsel for the petitioners contend. Suppose, in the case of only

(1) Journ. vol. ii. p. 14. col. 2.

three candidates nominated at the beginning, A, B, and C, the third C, to be obnoxious to the majority of the electors, and therefore to have no chance against the other two; and suppose a corrupt agreement between him and the first, A, that, after the first day of the poll, A shall decline; then the electors who have not yet polled must persist in
 [259] voting for the person who has thus abandoned them, or they must either not vote for a second member at all, or else give their voices to the party on whose account the first had declined; and he must, if he have a single voice, be returned as duly elected, even if he were the person in the world whom the major part of the voters would least wish to have for their representative.

After deliberation, the Committee, by their Chairman, informed the counsel, that they were of opinion:

That Mr. Burke, was eligible.

After this decision, the Committee desired, that the counsel for the petitioners would speak first, and separately, to the charge of bribery; because if that were proved, it would put an end to the cause. But, they declined that mode: and having moved that the question concerning the right of election should be separately argued, and determined; alleging, that such had been the usual practice, before the old judicature, where there was no de-
 [260] termination of the House, and the right was disputed; the counsel on the other side objected to this; and the Committee resolved,

“ That the counsel for the petitioners should
 “ proceed to open the whole that remained of their
 “ case.”

There is no determination of the House, of the
 right of election in Bristol, but it seemed to be
 taken for granted on both sides, that it is “ In the
 “ freeholders having freeholds of forty shillings a
 “ year, and the free burgessees.”

The numbers on the poll, as produced by one of
 the returning officers, were,

For Cruger	-	-	-	-	-	3565
For Burke	-	-	-	-	-	2707
For Brickdale	-	-	-	-	-	2456
For Lord Clare	-	-	-	-	-	283

It was admitted on both sides, that, if the votes
 of those persons, who were admitted to their
 freedom after the teste of the writ ought to be struck
 off, Mr. Brickdale would have a clear majority over
 Mr. Burke, and *vice versa*.

The counsel for the petitioners contended ; That,
 by custom, and the ancient usage of Bristol, such [261]
 persons have no right to vote ; and that such a
 custom is legal, reasonable, and convenient ; and
 they argued, that, independent of such a local
 custom, the votes of freemen, admitted after the
 teste of the writ, are bad upon general principles.

To prove the custom, they produced the follow-
 ing evidence :

Sir Jarrit Smith, formerly an attorney, said, That
 he was about eighty-four years of age ; That he
 remembered all the elections for Bristol since 1712,

and had taken an active part in many; That he took no concern in the elections of 1712, and 1714; but that he was a manager at the contested election of 1722; That, on that occasion, no free-men were suffered to vote, who had been admitted after the teste of the writ; That they were so exact, that, if they met with any rasure in the copy of admission tendered by a voter, they sent for the corporation-book to ascertain the true date; That several admissions appearing to bear date on the day of the teste, cavils arose about *them*, and to
 [262] save time, it was *agreed*, that the votes of those free-men should be taken; That at the next election, of 1727, which was also contested, and where he was a manager, the votes of persons made free after the teste, were rejected without controversy or dispute; That the same rule was followed in 1734, 1739, and 1754, when the elections were contested, and he was a manager, and in 1756, when he was a candidate, and there was a very warm contest; That there has been no contest since that year, till the last election; That, from a knowledge of the custom, persons entitled to be made freemen have usually pressed in at the chamberlain's office, to get admitted before the teste, that office being generally open at stated hours for that purpose; That he did not recollect that there was any *agreement* of the candidates, that freemen made after the teste should not vote; That he thought the custom immemorial; That, when he was a candidate, he had entered into no such agreement; That at the last election,

election, he had polled for Mr. Brickdale, but had not asked a single vote for him, not even that of his own son.

On his cross examination, a brief of his, which was proved to have corrections on it, in his own hand-writing, was produced, being designed for the House of Commons, on occasion of the election of 1734, when Mr. Coster, one of the candidates who were returned, was petitioned against by Mr. Scrope, the recorder of Bristol, who had also been a candidate. In this brief the right of election was stated to be, "In freeholders of forty shillings a year, and in *all freemen*, resident, or non-resident, "except such as lived in *alms-houses*;" an agreement was stated to have been made, between the contending parties, "That to prevent disputes, free-men admitted after the teste should not be "polled," and the witness's name stood on the brief, as the person who was to be called to prove this agreement. (The cause never came to be tried, the petitions having been withdrawn) (1.)

William Hart, Esq. said, That he was upwards of seventy; That he remembered his father's being a candidate for Bristol, in 1722; That it was then received as a general rule, that no freeman, admitted after the teste, should poll, and that none did poll; That, in 1727, they did not, for this reason, attempt to have any admitted after the teste; That such freemen did not vote in 1734; That he was a [264]

(1) 22 April, 1735. Journ. vol. xxii. p. 472. col. 2.

manager in all those elections ; That in 1739, the same rule was still observed ; That, on that occasion, he attended at the office to get freemen admitted, and left off as soon as the teste of the writ was known ; That he believed the managers, on the other side, did so likewise ; That he believed, that in 1756 some were polled who had been admitted to their freedom on the day of the teste.

[265] On his cross examination, he said ; That he remembered the case of Cofter and Scrope, in 1734 ; That Scrope attempted to confine the right of election “ To the freeholders of forty shillings a year, “ and the freemen *resident within the borough*, paying “ scot and lot ;” That in 1722, and in 1727, he did not know of there being any dispute about the votes of freemen admitted after the teste ; That he must have heard of it if there had been any ; That the first time he heard the subject talked of, was in 1734 ; That, in 1754, and 1756, he thought no such votes were offered ; That he did not know there was any bye-law to this purpose.

Thomas Harris, Esq. said ; That he was one of the returning officers, in 1754 ; That he, and his colleague, determined to refuse the votes of freemen admitted after the teste, conceiving that such was the ancient established usage ; That neither of the candidates objected to the rule, and that it was observed throughout ; That it was settled by the *agreement* of the sheriffs and candidates, that persons admitted to their freedom on the day of the teste should be allowed to vote.

Rowles

Rowles Scudamore, Esq. Barrister, said; That he was steward of the sheriff's-court in 1754, and in 1756; That there was in 1754, an altercation about the votes of persons admitted to their freedom upon the day of the teste, which was settled by all the parties agreeing that such persons should vote; That the same agreement was made in 1756, but that it was generally understood on both occasions, that none made free after the day of the teste could vote, and that there was no dispute on that subject.

It appeared, by the corporation-books, that many persons had been admitted to their freedom, subsequent to the teste of several writs where the elections were contested; and, on the examination of the poll-books of those elections, none of them were found to have voted.

At the last election, the first vote of this sort which was tendered, was objected to, and they were all entered on the poll with a Quere.

Such being the evidence brought in support of the custom, it was said; That it had been established by the testimony of persons best able to know the truth on the subject; men who had acted, at a variety of contested elections, in the characters of agents, candidates, or returning officers.

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The brief, which has been produced can prove nothing, for no inference can be drawn from what a solicitor states in a brief, in favour of his client. If the custom is proved, it is a lawful and reasonable custom. This the House has recognized in the

case of Norwich, by confirming a similar usage there.

12 March 170 $\frac{1}{2}$, Resolved, "That such persons, " as had a right to their freedom in the city of " Norwich before the teste of the writ, and took " out their freedom after the said teste, not having " demanded the same before the said teste, had " not a right to vote in the last election of citizens " to serve in this present Parliament for the said " city (1)."

[268] Independent of the usage, votes of freemen made after the teste of the writ, are bad on general principles; for the writ must be supposed to speak of electors, qualified to be so at the time when it issues, not of persons who become so afterwards (2). Votes too of persons who take up their freedom, on the eve of an election, merely on purpose to vote, (as was done by those now objected to, being most of them men entirely unconnected with Bristol, and who never before had thought of claiming to be made free of that place,) are bad on the general ground of fraud and occasionality (3).

On the head of bribery the facts came out to be; That a Committee of gentlemen who were in the interests of Mr. Burke and Mr. Cruger, had paid the fees of admission for the new freemen, with money raised by subscription for that purpose; but that neither of the candidates had subscribed, or

(1) Journ. vol. xiii. p. 791, Downton, p. 216.
col. 2.

(3) *Ibid.* Note (A.) p. 237.

(2) Vide *supra*, Case of

paid any of that money, and that no promise had been desired of the freemen so admitted, to vote for any one, as the condition of their fees being paid.

The counsel for the sitting members called Doctor Britton, aged sixty-three, to give evidence on the question concerning the right of persons admitted, after the teste of the writ. What he said did not materially vary from what has been stated.

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They argued, that the custom contended for, had not been proved.

If such an usage has always prevailed, it must appear by the books of the corporation, and other written documents; it must be known to a great number of witnesses; every alderman, every member of the corporation of Bristol, must know it; yet none of *them* have been produced to prove it.

The brief of Sir Jarrit Smith proves, that, in 1734, the contending parties *agreed*, "That persons made free after the teste of the writ, should not vote." To what purpose this *agreement*, if there was a clear established *custom* against them? Does not the agreement demonstrate that the custom did not exist? What appears upon that brief is not like the common contents of a brief drawn up by a *Solicitor* in behalf of his client. Sir Jarrit Smith is there stated as a *witness*, who was to prove the *agreement* to exclude those who were admitted after the teste; and it was revised by himself, and corrected with his own hand.

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If the usage originated from the agreement of

parties, it must fall to the ground; for it is an established maxim, that no consent of parties can alter the right of election. This was determined by the House in the case of Cirencester, 21 May 1624 (1).

Even if the custom had been proved, it would require strong precedents to support such a custom against men having an antecedent inchoate right to their freedom. In the Norwich case, which has been relied on, only thirty-six votes were objected to, and rejected in consequence of the resolution of 1701. Can we believe that, in so populous a city as Norwich, when there was a contested election, only that small number of persons entitled to their freedom *by birth or other antecedent rights*, should demand to be admitted? Ought we not rather to

[271] conclude, that the thirty-six were *honorary* freemen, who had been *elected* before, and were admitted after, the teste? Besides, the resolution does not lay down a general rule even for that place, but only declares that the votes of freemen who had been so admitted on that particular occasion, were bad.

But the custom in this case not being proved, the votes in question cannot be impeached on any other ground.

There is no law to make the teste of the writ the line, beyond which persons, having an inchoate right to vote, cannot complete it, so as to exercise

(1) Journ., vol. i. p. 708, col. 1.

their franchise at that election. In several cases, the House has allowed the votes of persons, having an antecedent right to their freedom, although never admitted. In the case of Guildford, 3 Feb. 17¹⁰/₁₁, it was admitted before the Committee of elections, "That one who has served a seven years' apprenticeship in the town to a freeman, is, *ipso facto*, a freeman (1)." And in that of Sudbury, 19 Jan. 170²/₃, it was resolved by the House, [272] "That persons having certain inchoate rights to freedom (described in the resolution) have a right to vote, without any admission (2)."—In Newcastle, the constant practice is to hold a guild, after the proclamation, in order to admit freemen who have an antecedent title; and this was never objected to.—At the last election for the county of Monmouth, a person who had voted having died, pending the poll, his son voted for his land, and his vote was holden to be good.

Great inconvenience would follow, if the teste of the writ were to be fixed as the period, beyond which no freemen can be admitted. It might be the means of improper influence and partiality; for, on an intended dissolution, a candidate, who happened to be in the good graces of those whose situation makes them acquainted with such a design, might be apprised, in time to have as many of his friends admitted as would out-num- [273]

(1) Journ. vol. xvi. p. 477, col. 2. See the resolution stated at large in the case of Sud-

(2) Journ. vol. xiv. p. 191, bury. *infra*.

ber those of an antagonist who had not the means of such useful intelligence.

As to occasionality; It is clear from the Durham act (1), that this objection cannot lie against men possessed of an antecedent title, for *they* are excepted out of the restriction of that statute. The exception with regard to Norwich and London, in the Durham act, only corroborates the inference drawn from that act. There is a particular statute for regulating elections (2) in the city of Norwich, by which *every* person before he can poll at an election of members of Parliament, must swear, "that he has been *admitted* a freeman of "that city for twelve calendar months." It is therefore provided, that the Durham act shall not extend to Norwich, lest, otherwise, the exception with regard to persons having an antecedent right to their freedom, should have been thought to repeal *as to them* the provision just stated from the statute relating to that place. The same reasoning [274] will apply to the exception of London, because, by the statute for regulating elections in that city, *no person* can vote for members of Parliament there, who has not been actually on the livery twelve calendar months (3).

Indeed it would be absurd to object occasionality to persons entitled to their freedom, by birth, marriage, or servitude, since nobody ever entered into the relations of son, husband, or appren-

(1) 3 Geo. III. cap. 15.

(2) 3 Geo. II. cap. 8.

(3) 11 Geo. I. cap. 18.

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tice, for the purpose of acquiring a vote. Such persons are to be considered as having purchased their right; and it would be unjust to prevent their perfecting and exercising it, at any time when they please. Occasionality can really be objected only to honorary freemen, who have never any connection with the borough, and might be brought in, in such numbers as to deprive the fair freemen of all the benefit of their franchise,

As to the charge of bribery; It has been proved that there was not a farthing paid by the sitting members for the admission fees. If candidates, or their agents, or perhaps, even their partizans, were to pay for the admission of freemen with a conditional stipulation for their votes, *that* would be corruption, and would affect both the electors and the elected. But, if even a candidate were to pay for such admission without any stipulation, *this* would be entirely innocent; as much so, as when one defends the rights of his constituents on petitions in the House of Commons, or *Quo Warrantos* in the courts of law. [275]

In the reply, the counsel, on the part of the petitioners, insisted;

That the custom had been proved.

It is a strange objection that so few witnesses have been called to establish the custom, when, on the other side, they have called none to contradict it. It is said, that the members of the corporation of Bristol have not been produced to prove it. Why have they not been called to disprove

prove it? This is not a custom of such a general sort as to be commonly talked of. It could only come in question at the time of a contested election, and, as was said before, the witnesses who have appeared to prove it, are men who, by being actively concerned on such occasions, were most likely to be acquainted with it. It is not the practice any where to enter the right of election in the corporation-books: if it were, that right would soon come to be vested solely in those who have the care of, and power over, those books.

The *agreements*, at several elections, that persons admitted *on* the day of the teste should be allowed to vote, is the strongest evidence that those admitted *after* could not vote. If *these* could have voted, the right of *those* could never have been a question. It is contended, that those admitted after the teste were excluded merely by the *agreement* of the parties; but can it ever be believed that the persons supposed to have been the objects of such agreement, would have submitted to have been so deprived of their right? Can it be imagined that both the candidates could have such an equal number of partizans under this description, as that neither should find it his interest to refuse concurring in such an agreement? This inference has been drawn from what is stated in the brief with regard to the evidence to have been given by Sir Jarrit Smith. But what was he to prove? That the parties had agreed that freemen who had been admitted after the teste, or who *lived in alms-houses*, should

should not be polled (1). Alms-men are no where entitled to vote (2); the agreement applies equally to *them*. It therefore only can mean that the parties agreed, "that such persons had no *right* to "vote."

The teste of the writ is a period from which both the legislature and the House draw a line in many cases, as in the treating act of the 7th and 8th of King William, &c. the Case of Norwich, &c. (C.)

There is nothing in the Norwich case to warrant the construction put upon the resolution of the House in that case; for the freemen excluded from voting by the resolution, are expressly described "as persons having *a right* before the teste; and, if this meant any right more particularly than another, it is more likely to mean such a right as often exists for a long space of time before it is perfected by admission, such as the right acquired by birth, servitude, or marriage, than one gained by election, which is generally followed immediately by admission. The instances of Guildford, and Sudbury, only prove particular customs in those two places. As to the pretended inconvenience that might happen, the very attempt of such a surprize would prevent it, for a great number of persons could not be brought together to be admitted to their freedom, by one candidate, with-

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(1) It was stated, that he likewise the agreement.
was to prove the right to be as (2) *Vide infra*, Cases of
mentioned in the brief; and Bedford, and Haslemere.

out his antagonist's being apprised of it, and enabled to act accordingly.

[279] The Durham act has left the occasionality of voters having inchoate rights just as it found it. That statute appears, by the preamble, to be aimed solely at occasional *honorary* freemen; and, if it has not extended the restriction of a year to the others, neither has it said, that their votes can, in no case, be occasional. Though such persons do not *gain* their antecedent titles, for any occasional purpose of voting, they may, and often do, *complete* those titles, for such occasional purpose. Where they do, their votes ought to be rejected on that particular occasion, though they will be valid at any future election. The exceptions in the Durham act, relating to London and Norwich, were only made, because there were particular statutes for the regulation of elections in those places; and *they* show pretty clearly that the legislature understood that there might be occasional *admissions* of persons who have an antecedent *right* (D).

[280] During the course of the evidence produced by the counsel for the petitioners, in order to support their charge of bribery, a witness was called to prove the payment of money, by a supposed agent of Cruger. On this, an objection was taken to their examining any witness as to the payment, till they should first bring proof of the agency.—It was answered; That the circumstances which would establish both facts were so complicated, that they could not be separated. The point was argued;

gued; and the Committee, having cleared the court, after some deliberation among themselves, over-ruled the objection (1).

On Monday, the 20th of February, the Committee, by their Chairman, informed the House that they had determined (2).

That the two sitting members were duly elected.

And Mr. Burke, having been chosen likewise a burges for the borough of Malton, in the county of York, made his election to serve for the city of Bristol (3).

(1) *Vide supra*, Case of Hindon.

(2) Votes, p. 246.

(3) *Ibid. loc. cit.*

N O T E S

ON THE CASE OF

B R I S T O L.

Note
(A.)

PAGE 251. (A). There is a very strong instance of a person's being chosen, and obliged to sit, against his will, which happened in this very city of Bristol.

16 May, 1661. " Serjeant Charlton reports from the
" Committee of privileges and elections, concerning the
" double return for the city of Bristol, That Thomas Earl
" of Ossory, and John Knight, Esq. were returned as ci-
" tizens to serve for the said city of Bristol by one inden-
" ture; and that Sir Humphrey Hooke, knight, and John
" Knight, were returned by another indenture; and that
" Sir Humphrey Hooke subscribed to the election of the
" Earl of Ossory, and sealed to his return, and renounced
" his own election; and the opinion of the said Committee
" thereupon, that the return was therefore single; and that
" Sir Humphrey Hooke might renounce his return; and
" that the Earl of Ossory ought to sit, *till the merits of the
" cause touching the said election were determined.*

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" Resolved, That this House doth agree with the Com-
" mittee; and that the Earl of Ossory do sit in the House,
" *till the merits of the cause touching the said election be de-
" termined.*" Journ. vol. viii. p. 250. col. 1.

21 Sep-

21 September, 1666, (the same Parliament continuing)
“ Resolved, That the matter concerning a member to serve
“ for the city of Bristoll, instead of the Lord Ossory, be re-
“ ferred to the Committee of elections; to examine the
“ matter of fact; and to report it to the House.” Journ.
same vol. p. 626. col. 1.

6 October, 1666. “ Sir Job Charlton reported from
“ the Committee of elections, touching the election for the
“ city of Bristol, That the Committee had examined the
“ matter referred, and perused the report of the Committee;
“ and the vote of the House thereupon, bearing date the 16.
“ of May, 13^o. Car. IIdi. *regis*: Which he read, in his
“ place, to the House: and also informed the House of
“ two petitions; one heretofore preferred by the burgeses
“ of the city of Bristoll to the Committee of elections; and
“ another lately by them tendered, to be presented to the
“ House: Which he delivered in at the clerk’s table.

“ The question being put, That it be referred to the
“ Committee of elections, to hear the merits of the cause
“ touching the election for the city of Bristoll.

“ The House was divided—Yeas 94; Noes, 83. So it [283]
“ was resolved in the affirmative.” Journ. same vol. p.
631. col. 2.

13 October, 1666. “ Resolved, That this House doth
“ agree with the Committee of elections, in the order for
“ the mayor of the city of Bristoll’s attendance before them.”
Journ. same vol. p. 635. col. 1.

30 October. “ Sir Job Charlton reports from the Com-
“ mittee of elections, That they had examined the merits
“ of the cause touching the election for the city of Bristoll;
“ and found, that Sir Humfry Hooke had much the ma-
“ jority of voices: and that the opinion of the Committee
“ was, that Sir Humphry Hooke was duly elected, and
“ ought to sit.

VOL. I.

P

“ Resolved,

Note
(A.)

“ Resolved, That this House doth agree with the Committee, that Sir Humphry Hooke was duly elected, and ought to sit.

“ Ordered, That **, the now mayor, heretofore sheriff for the city of Bristol, be committed to the custody of the serjeant at arms; for his misdemeanour in making a false return for the said city.” Journ. same vol. p. 644. col. 1.

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There is no great probability that many instances of this sort should occur in our days; however, if a person were to be chosen, and returned, against his inclination, he might, since the statutes of 9 Anne, cap. 5. and 33 George II. cap. 20. vacate his seat, by refusing to take the qualification oath, appointed to be taken by the first of those acts on the requisition of any candidate or of any two voters at the election, or that which, by the other, every member is to take at the table of the House before he shall presume to sit, or vote. For the statutes enact, that, whenever any one presumes to sit or vote, without taking those oaths, his election shall be void; and that a new writ shall issue. The eldest sons, or heirs apparent of peers, or of any persons qualified to be knights of the shire, and the members for the two universities, and for Scotland, are not required to have the qualifications made necessary for other members by the statute of Queen Anne, nor obliged to take the oaths just mentioned; so that, if any one answering to either of those descriptions were to be chosen, and returned, against his inclination, it would seem that he must submit, unless the minister should come to his relief, by bestowing an incapacitating office upon him.

Note
(B.)

P. 257. (B). The Case of Beeralston, as it is printed in the Journals, is *verbatim* as follows:

28 April, 1640. “ Mr. Jones reports from the Committee
“ tee

“ tee of privileges, That Mr. Strood, Mr. Hardinge (1),
 “ and Sir Amias (2) Meredith, were all returned for the
 “ borough of Beere-elfton, in the county of Devon.—The
 “ sixteenth of March, upon true notice to the inhabitants,
 “ twenty-six appeared; and at that time, Mr. Strood, Mr.
 “ Slainy, and Mr. Wilde (3) were competitors; and elec-
 “ tion was so far made at that time, that Mr. Strood should
 “ be a burges for that town if either Mr. Slainy, or Mr.
 “ Wilde (4) were made knights of the shire for the coun-
 “ ties of Devonshire or Cornwall—Adjourned again to 27^o
 “ *Martii*.—Then cometh other two competitors, with Mr.
 “ Strood, Sir Ananias Meredith, and Mr. Harris, who had
 “ seventeen voices, Sir Ananias Meredith twelve voices,
 “ and Mr. Strood had but six.—This is the fact of the
 “ case.

“ But in the disposition of it, by proof, the point falls out
 “ to be—Whether there was a clear election of Mr.
 “ Strood the first day:—2. Whether with a condition:—
 “ 3. Whether, though but with six voices at the last elec-
 “ tion, it shall avoid the first election.

“ In debate of this case, they all agreed, that, if in case he
 “ was well elected the first day upon condition, it was good
 “ *de facto*; for Mr. Wise was made knight of the shire: a
 “ great part were of opinion, that a condition to an election
 “ was void; for, by the laws of this realm, they conceive
 “ that elections ought to be free; and to have a condition,
 “ precedent or subsequent to an election, was against law:
 “ But these disputes were at last set out of doors; and they
 “ found the election absolutely was clear for Mr. Strood
 “ the first day, and no condition at all.—Mr. Wise and Mr.
 “ Slainy, both before, and after the election, made a decia-
 “ ration, that if either of them were knights of the shire,
 “ Mr. Strood should have the *first* place, as a burges.

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(1) Probably should be Harris.

(3) Probably Wise.

(2) Probably Anania

(4) *Ibid.*

Note
(B.)

“ They conceived the election was clear ; and, upon
“ the question, they voted, that Mr. Strood was clearly
“ elected.

“ There was no exception taken, because he was, *de facto*,
“ chosen the second time.—If the first election was clear,
“ the second concludes him not.

“ They objected, his indentures were last returned. Pri-
“ ority, in the return of indentures, worketh no disadvan-
“ tage to him that comes last.

“ So it was voted, the first election was good, and with-
“ out any condition : *and Mr. Harris sworn, without ex-*
“ *ception.*

“ It is ordered, that Mr. Strood shall be admitted to come
“ into the House, according to the report of his due elec-
“ tion ; and

“ Declared, that no conditional election ought to be al-
“ lowed.” Journ. vol. ii. p. 14. col. 2.

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Though this account is very confused and inaccurate, we may collect two things from it. In the first place, that it was not thought any objection to Mr. Harris that he had not been proposed at first ; and secondly, that it was a sort of distinction to be the *first* burghes, that is, the first chosen. It appears from Glanville's Reports, not only in the case of Arundel, but in those of Southwark, p. 7. and Stafford, p. 25, and in most of the others contained in that book, that in those days, the method was, first to propose and choose one member, who was called the *first* burghes or knight, and then the other. In the case of Chippenham, cited in the notes to the Introduction (W). (*supra*, p. 91.) anno 1624, “ The bailiff was ordered to return John Maynard, Esq. the *first* burghes.” There is an instance in the first year of Henry V. of the two knights for the county of Lancaster being returned by two distinct indentures of return, (Prynne Brev. Parl. rediviva, p. 163). The adjournment of the election so as to leave an interval of *days* between the

the election of the first and second member, did not vitiate the election of the second. It is not even taken notice of in the above case of Beeralston as irregular; nor in that of Chippenham, (as it is reported in Glanville, p. 51.) where there was a similar adjournment. I do not know of any thing to hinder the election of the two members being made the one after the other, at this day.—As by the freeholder's oath, every freeholder must swear that he has not been polled *before* at that election, it may be supposed, that after having polled once for one member he could not come at a future time and vote again for another; but the fair construction of the oath seems to be, that he has not polled before for the election of a member to fill the same place.* That this is the sense of the oath, I think we may infer from what the voters in the city of Norwich are obliged to swear at elections, where the same meaning is only more explicitly expressed. The oath prescribed to them by the statute cited, *supra* p. 273. is as follows. "You do swear, that you are, and for twelve kalendar months have been admitted a freeman of the city of Norwich, and that you have not been before polled at this election, or (in case of an election for two citizens) *but for one person*."

Note
(B.)

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P. 277. (C). From the treating act of King William, and the standing order of the House of 21 October, 1678, (Journ. vol. ix. p. 517. col. 1.) (1.) on which that act is founded, from the supposed custom, and long practice at Bristol, and the resolution of the House in the Norwich case, as well as from the tendency of the evidence which appears to have been given in a great variety of cases of controverted elections, at different periods, it is very certain, that there has been long an idea, that the teste of the writ was the period

Note
(C.)

[* But *vide* Case of Leicester, 8 Feb. 1705-6. Journ. vol. xv. p. 135, col. 2. 137, col. 1.] (1) *Vide infra*, Case of St. Ives, Note (B).

Note
(C.)

for ascertaining when any acts were clearly done for the purpose of influencing an election, such as giving money, treats, &c. or making votes. However, the decision in this case of Bristol, will, probably, establish the general validity of votes to which the only objection is, that the admissions were after the teste of the writ; for, if that objection had been good, Mr. Brickdale must have succeeded against Mr. Burke.

Note
(D.)

P. 279. (D.) The act for regulating elections in the city of Norwich, is not printed in the common editions of the statutes, being one of those public acts which are said to be *of a private nature*.

VII.

THE

C A S E

Of the BOROUGH of

C R I C K L A D E,

In the County of WILTS.

The Committee was chosen on Tuesday, the 14th of February, and consisted of the following Gentlemen :

Right Hon. Thomas Townshend,	Members for	Whitchurch.
Chairman - - - - -		Oxfordshire.
Lord Charles Spenser - - - - -		Chester.
Richard Wilbraham Bootle, Esq.		East Retford.
Sir Cecil Wray, Bart. - - - - -		Bucks.
George Grenville, Esq. - - - - -		Yarmouth, Hants.
Jervoise Clarke, Esq. - - - - -		Fowey.
Philip Rashleigh, Esq. - - - - -		Shropshire.
Noel Hill, Esq. - - - - -		Clitheroe.
Thomas Lister, Esq. - - - - -		Reading.
Francis Annesly, Esq. - - - - -		Steyning.
Thomas Edward Freeman, Esq. -		Bath.
John Smith, Esq. - - - - -		Liverpool.
Richard Pennant, Esq. - - - - -		
N O M I N E E S,		
<i>Of Mr. Peach :</i>		
John Bond, Esq. - - - - -		Corfe Castle.
<i>Of Mr. Dewar :</i>		
Viscount Beauchamp - - - - -		Orford.

P E T I T I O N E R S :

- Samuel Peach, Esq. and John Dewar, Esq.

C O U N S E L,

For Mr. Peach :

Mr. Lee, Mr. Widmore.

For Mr. Dewar :

Mr. Mansfield, Mr. Murphy.

THE
C A S E

Of the BOROUGH of

C R I C K L A D E.

AT the last general election, Arnold Nesbit, Esq. and William Earle, Esq. were chosen members of Parliament for Cricklade. In December following, a vacancy happened, by the death of Mr. Earle; and, a new writ being ordered on the 20th of that month, the election came on the 27th, and Mr. Dewar and Mr. Peach were both returned, by the same indenture. They both petitioned the House on the 19th of January, and, this being the case of a double return, an early day was appointed for taking their several petitions into consideration.

On Wednesday, the 15th of February, the Committee being met, the two petitions were read.
Mr.

Mr. Dewar's petition set forth; That he had a great majority of legal votes; but, that, notwithstanding, Thomas Carter the bailiff and returning officer, had returned Mr. Peach, together with the petitioner; Praying, therefore, that the name of Mr. Peach might be erased from the return, and the petitioner declared duly elected, or have such other relief as the House should think meet (1).

[295] Mr. Peach, in his petition, set forth; That on the second day of the election, as the returning officer, the candidates, and electors, were proceeding to the place of polling, a riot commenced, which obliged the returning officer immediately to close the poll, when only forty-one, out of near two hundred persons entitled to vote, had given their suffrages; and that, on that account, Mr. Dewar and the petitioner were returned; That the petitioner was, by reason thereof, prevented from receiving the suffrages of a large majority of the electors, and of obtaining a legal right to represent the borough; That, from the death of Mr. Earle to the close of the poll, Mr. Dewar, or his agents, had, by feasts and entertainments daily given at their expence to the electors, endeavoured to procure votes for Mr. Dewar, and had kept the borough in continual riot, tumult, and dissipation; That by the above means, and by the conduct of the returning officer, the sense of the electors at large had not been taken: He prayed, therefore,

(1) Votes, p. 123.

that the House would grant such relief as upon examination should appear just (1).

The material evidence, and facts of the case, were as follows :

On the first day, Carter, the returning officer, delayed beginning the poll for near two hours, waiting for the arrival of Mr. Nesbit, the other member, who is lord of the manor, and was the declared partizan of Mr. Peach; Mr. Nesbit, however, did not appear at the election.

The returning officer was attended by a gentleman of the bar, as counsel, who, at the general election, [296] had acted in that capacity for Mr. Nesbitt, and, before this election began, had received a retainer from Mr. Peach, and, (as he said himself on his examination before the Committee) expected to be paid by him, for his attendance on the returning officer. He said, that, when he took the retaining fee from Mr. Peach, he told him that he accepted of it, only on condition of being at liberty to decide upon the disputed votes, according to certain general principles, which he had laid down, and followed, at the preceding election. He said, that both at the former, and the present election, he was almost entirely guided, as to the right of the several voters who presented themselves, by the information of one King, a blacksmith, looking upon him to be the person who best knew the titles of the different electors. That he knew, however, that

(1) Votes, p. 123, 124.

King was much in the interest of Peach. He said, that in receiving or rejecting votes, the returning officer followed his (the counsel's) directions implicitly, and was merely his *echo*.

[297] There were warm disputes and altercations during the first day, between the counsel for Mr. Dewar, and the returning officer; the former, having, as the witnesses called on the part of Mr. Peach swore, used very injurious expressions, and menacing gestures, to the latter. But this was afterwards strongly contradicted by the witnesses on the other side.—One of the subjects of dispute was the method of taking the poll. The returning officer, and the counsel for Peach, insisted that it should be by house-row, beginning with the voters whose houses were at the end of the town, and going along one side of the High-street, agreeable to the former practice. The counsel for Dewar was for taking the poll as the voters should happen to offer. At the close of the first day, the numbers were, 26 for Dewar, and 15 for Peach.

[298] It was proved, and the counsel for the returning officer acknowledged, that, on the evening of the first day of the poll, he went to a meeting of Peach's counsel and agents; and that he was present at a consultation they held, about the conduct, and the event, of the election; and also, that he had called at the lodging of the counsel for Peach the next morning, before he went to the place of polling.

One Archer swore, that he had, on the morning
of

of the second day of the poll, overheard a conversation at the lodging of the counsel for Peach, between that counsel, the returning officer's counsel, King, and others; when it was proposed that, as soon as ever Peach should be a-head, they should close the poll.

Archer had gone that very morning, and told this story to Mr. Parker, agent for Dewar, and had carried him, to show him a hole which went through the ceiling of the room in which the counsel for Peach lodged, and the floor of the room above it; and Parker swore before the Committee, that, through this hole, it was easy for a person in the room above, to hear any thing that was said below with the ordinary loudness of conversation. Archer had access to that room, the master of the house being his uncle. But his evidence was flatly contradicted by every one of those, who, according to that evidence, were present at, and took a share in, the conversation in question.

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Several witnesses were called to impeach the character, and credibility, of Archer; and among others, his own uncle; and others were called, by the other side, to impeach the credibility of those witnesses.

When the returning officer, with the candidates and their agents, went, on the second morning, into the church where the election was holden, a sort of scuffle happened at the door of the church, between Mr. Herbert a member of the House of Commons, and Mr. Benson a merchant in London,

don, who had accompanied Peach, and had been made a constable on this occasion. Benson pushed Herbert from the door, as he endeavoured to enter, on which Herbert collared him, he (Benson) not having any staff that could distinguish him as a constable. After this, they, and a number of other people who were at the porch of the church, rushed in; and the dispute between Herbert and Benson still continuing, several of Peach's friends cried out "*a riot, a riot,*" and a good deal of confusion arose. On this, the counsel for the returning officer directed him to close the poll, which he did; and they left the church together, although earnestly entreated by Dewar and his friends to remain. In their way home, they walked directly through the crowd, without meeting with any molestation.

Both the returning officer, (who is a man of seventy-six years of age) and his counsel, swore, that they thought they could not have continued at the church, without the most imminent danger; That threats of a most alarming nature had been thrown out, for several days previous to the election, against both; but, that they had only heard of those threats at second hand, and, they could not say they saw any blow, or any act of violence, done by any body, at the time when the poll was shut.

Many persons of character, who were called on the part of Dewar, swore, on the contrary, that neither before nor during the election, any thing like

like a riot, or disturbance, sufficient to terrify any reasonable man, had happened ; nay, that they believed no town had ever been more quiet at the time of an election ; except that there were vehement altercations among the counsel. Those witnesses also swore, that, while the poll lasted, the returning officer, and his counsel, acting obviously in concert with the counsel and agents for Peach, had shown the most glaring partiality towards that side ; admitting votes without enquiry for Mr. Peach, and rejecting others without examination which were tendered for Mr. Dewar.

When the poll was closed, and the returning officer had retired with his counsel to his inn, Mr. Herbert came to him, and entreated him to renew it, promising to give any security, he should require, that he would not molest Benson, nor occasion any disturbance ; and desiring, if it were thought necessary for the quiet of the election, that Benson and he might both be committed till it should be over ; But the returning officer, and his counsel, absolutely refused to open the poll again. His counsel declared, in giving his evidence, that *if any disturbance had arisen*, in the course of the poll, and Peach happened to be ahead, he was determined that the poll should be closed immediately, and Peach *singly* returned. [302]

When the returning officer had, in this manner, refused to renew the poll, all the electors in the interest of Mr. Dewar went and gave their voices, before a constable, for him. Mr. Peach's friends
were

were apprized of this poll before the constable, and were warned to attend, and give their votes ; but none of them came.

There was no evidence produced sufficient to bring home treating or entertaining the electors, to Dewar, or his agents.

The counsel for Mr. Dewar insisted,

[203] That, as he had a clear majority at the close of the poll, the returning officer was bound, by his office, to return him solely, and that the Committee ought to determine that he was duly returned and ought to sit. That the House might perhaps, after the return was amended, admit such of the electors as had not had an opportunity of giving their suffrages to petition on that ground, and so bring the merits of the election in question. That there was such a proceeding in the case of Pontefract, reported by Glanville, where, though the circumstances were not exactly similar to those of the present case, yet the principle was the same. In that case, two returns were made to the sheriff, by different persons. The poll had been closed, in consequence of a riot, before the election was over. The House ordered that the person returned by the proper officer, should take his seat, although afterwards, in consequence of a petition from the electors who had been deprived of an opportunity of giving their votes, the election was avoided. That indeed it is said, in that case, that, where the return is irreconcilably repugnant, neither of the parties are to be admitted into the House. But, that this is explained by what fol-

lows, for the words of Glanville are, "That neither of the parties are to be admitted into the House, *till the return be amended,*" which was what was prayed to be done by Dewar's petition. That in the present case, there was no petition, no complaint, from the electors; and, whatever *they* might have a right to do, Mr. Peach was estopped from complaining that the poll was improperly closed, since the closing it was virtually, and in substance, his own act. That both the returning officer, and his counsel, acted in concert with Peach's counsel; that their acts were, in fact, his, and they were mere agents for Peach. That it was clear, from irresistible evidence, that there was no danger, nor appearance of danger, to justify their abrupt departure from the place of the poll, or their refusal to renew it. That, if they were afraid, they had taken a very extraordinary manner of pacifying Mr. Dewar's partizans, for they had done the very thing which, of all others, was most likely to exasperate them. That fear could not possibly be their motive for not renewing the poll, after the disturbance occasioned by the dispute between Herbert and Benson was adjusted, so as not to leave any chance of its being revived. That if the Committee should credit the testimony of Archer, they must believe that there was a premeditated design to break off the poll whenever the numbers should happen to be in favour of Peach. That the returning officers counsel had acknowledged, that *if any disturbance shall arise*, Peach being a-head, he

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was determined that the poll should stop, and Peach be returned. That this certainly afforded a strong presumption that Peach's friends, when they began to find that it was in vain to wait for even a momentary majority against Dewar, had themselves, by concert, begun the scuffle at the door of the church, in order to have the pretext of a riot, as an excuse for stopping the poll, and making a double return. That the charge of treating and corruption had not been supported by the smallest evidence. That it would be very extraordinary if Mr. Peach, without having proved a
[306] single allegation of his petition, should obtain the only end he could propose by it. That surely the Committee would never suffer him, contrary to a known maxim of law, to take advantage of his own wrong. Nor after he had shut up the poll, because he found that, on that occasion, the major part of the electors were against him, would they, by declaring the election to be void, enable him to gain the time and opportunity he wanted, of strengthening his party, and undermining the interest of Mr. Dewar.

They likewise urged, that the gross partiality and misconduct of the returning officer, and his counsel, ought to be laid before the House; there never having been an occasion of the sort which called more loudly for censure and punishment. That if such an example were to pass unnoticed, others, at future elections, would be tempted to imitate their conduct, trusting to meet with the same impunity.

C R I C K L A D E.

punity. That, in a case very like the present, which happened in this very borough, in 1689, (1), the returning officer, though much less culpable than the present, was ordered into custody. [307]

On the part of Mr. Peach, it was said,

That the riot had been sufficiently proved; but that, if it had not, the allegation in the petition was only matter of form, and to be considered as resembling "*the instigation of the devil*," laid in an indictment, which is never meant to be proved. That no credit could be given to Archer. That his testimony did not correspond with the event. That an intention of stopping the poll when Peach should be a-head, could never prove that it was stopt, from a preconcerted design, at a time when Dewar was a-head. That whether the returning officer was influenced by that sort of fear which the law supposes to fall *in constantem virum*, or not, still as the poll, in fact, was shut before all the electors had an opportunity of giving their votes, the election must be considered as void.

They *suggested* that a petition of many of the electors had been prepared, and was ready to have been presented, but that it was not, because those who had subscribed it were necessary as witnesses, and therefore could not be parties too. [308]

They defended the conduct of the returning officer, and his counsel. They said that the counsel had advised the other to follow the ancient

(1) Journ. vol. x. p. 72, 73. *Vide infra*, p. 311.

usage of the place in taking the poll by house-row contrary to the wishes of Dewar, and his friends. That he likewise had advised him to reject all the votes under a certain description, because, in his opinion, they were bad. That, whenever the right of election at Cricklade came to be agitated, the rule he laid down would probably be established. That it was not his fault that most of the votes under that description were tendered for Dewar. Yet this was, in truth, the whole of what had been called gross partiality. That the taking a retainer from Peach, with the previous condition of deciding according to his own judgment, and even the associating with Peach's friends, was, at most, an imprudent part, but was neither criminal, nor such as merited either the animadversion of the Committee, or the censure of the House.

In the course of the evidence, Mr. Dewar's counsel offered to produce the poll taken by the constable, in order to show that a large majority of all the electors of Cricklade would have voted for him. If that could be shown, they said, he must be declared duly elected.

This evidence was objected to.

It was said to be inadmissible, that poll not having been taken before a legal returning officer; that it was not mentioned in Dewar's petition, and, besides, that it could not ascertain the proportion of electors in Dewar's interest, since none of Peach's friends had polled; and that they were not obliged to attend or vote on that occasion, as
they

they had not been, and could not have been, summoned according to law.

To this it was answered,

That the constable's poll, on this occasion, was the best evidence that could be given of the fact: much better than the *viva voce* testimony of the persons who had polled could now be; seeing that, since that time, they had been exposed to influence, and might have been practised upon by the other candidate. That the constable's poll would be a direct answer to that part of Peach's petition, where he alledges, that the majority of voices would have been in his favour if the election had not been interrupted. That it was of no consequence that none of Peach's friends attended, for it could be shown that out of the number of voters which he himself stated to be in the borough, by far the greater part were for Mr. Dewar. That there were cases which proved that where a returning officer refuses to complete the poll, the electors may go and vote before a constable, or even a private person, and that their poll will be allowed by the House, and the merits of the election decided upon it.

[310]

[311]

That in this very borough, 1 April, 1689, in a case circumstanced like the present, the returning officer, under a pretence of danger, closed the poll before all the electors had voted. The numbers then stood thus: 21 for Webb, one of the candidates, and only 5 for Freke, the other candidate. The returning officer refused to renew the poll, on

which it was continued by the constable, and when the two lists were added together, the numbers were, for Freke 50, and for Webb only 25. The House allowed the constable's poll, and declared Freke duly elected (1).

[312] That a stronger case still was that of Liverpool, 5 March, 17²⁹/₃. On that occasion, witnesses being examined as to the mayor's withdrawing himself from the place of polling, before he had taken the suffrages of several persons who tendered their votes for the petitioner; and one Henry Orme being called, and examined, and producing a list taken by him of divers persons, who gave their votes for the petitioner, after the mayor had left the place of polling; and the sitting member's counsel objecting against the admitting such evidence; the point was argued, and the counsel being directed to withdraw; the House resolved, "That the paper produced by " Henry Orme, containing a list taken by him of " persons who voted for the petitioner, after the " mayor had left the place of polling, be admitted " as evidence of such persons voting (2)."

That, in the former of these two cases, it might be said that the electors on both sides waved any objection they might have made to the illegality of the person who took the poll, persons having, in that case voted on both sides before the constable. But that this observation would not apply to the second where none voted but on one side; yet the

(1) Journ. vol. x. p. 72, 73.
Vide supra, p. 306.

(2) Journ. vol. xxi. p. 476,
col. 2.

C R I C K L A D E.

Houfe admitted the poll then taken, though by a private perfon, to be given in evidence.

In their reply, on this point, the counfel for Mr. Peach took notice of the diftinction between the cafe of 1689, and the prefent; and they obferved that it was more neceffary now that the legal returning officer fhould take the poll, than it was when either of the two former cafes happened, fince now, by the ftatute of George the Second (1), every voter is liable to have the bribery oath tendered to him, " which he is to take before the returning officer, or others legally deputed by him." That this oath the conftable could not adminifter, and therefore could not be at all confidered as capable of taking a legal poll.

The Committee, after long deliberation, refolved,

That the conftable's poll fhould not be given in evidence.

They likewise refolved,

That parole evidence fhould not be admitted to prove what perfons polled before the conftable.

(1) 2 George II. cap. 24. col. 2. So that the election That act took effect on the probably happened before the 24th June, 1729. The writ act was to take place; and, in the Liverpool Cafe, which therefore, the diftinction taken was on a vacancy, was ordered by the counfel for Mr. Peach applied to *both* the cafes cited on the 14th of May of that year. Journ. vol. xxi. p. 76, on the other fide.



On Tuesday, the 21st of February, the Committee, by their Chairman, informed the House, that they had determined,

That neither Mr. Peach nor Mr. Dewar were duly returned; and that the last election for the borough of Cricklade was a void election.

And they did not make any special report.

¶ The counsel for Mr. Peach began in this case, according to the standing order of March 1727; "he being first named in the return (1)." This circumstance depended on the returning officer; but, from the nature of the case, Mr. Dewar was more properly the *plaintiff*; and, for that reason, I have given the first place to the arguments of his counsel.

(1) Vide case of Milborne Port, *supra*, p. 100.

VIII.

THE

C A S E

Of the BOROUGH of

NEW RADNOR,

AND ITS

CONTRIBUTORY BOROUGHs,

In the County of RADNOR.

The Committee was chosen on Friday, the 17th of February, and consisted of the following Gentlemen :

John Elwes, Esq. Chairman - -	} Members for	Berkshire,
Francis Page, Esq. - - - -		Oxford University.
Charles Garth, Esq. - - - -		Devizes.
Sir George Robinson, Bart. - -		Northampton.
Abel Smith, Esq. - - - - -		Aldb. Yorkshire,
Hon. Thomas Francis Wenman -		Westbury.
Thomas Halsey, Esq. - - - -		Hertfordshire.
Sir Henry Houghton, Bart. - -		Preston.
Anthony James Keck, Esq. - -		Newton, Lan.
William Chaytor, Esq. - - - -		Penryn.
Lord George Gordon - - - - -		Luggershall.
Ambrose Goddard, Esq. - - - -		Wiltshire.
Filmer Honeywood Esq. - - - -		Steyning.
NOMINEES		
<i>Of the Petitioners :</i>		
Bamber Gascoyne, Esq. - - - -		Truro.
<i>Of the Sitting Member :</i>		
William Adam, Esq. - - - - -		Gatton.

PETITIONERS :

Edward Lewis, Esq.

Several Burgeſſes of the Borough of New Radnor,
and its Contributory Boroughs.

Sitting Member :

John Lewis, Esq.

COUNSEL,

For the Petitioners :

Mr. Mansfield, Mr. Hardinge.

For the Sitting Member :

Mr. Bearcroft, Mr. Lee.

THE
C A S E
Of the BOROUGH of
NEW RADNOR,
AND ITS
CONTRIBUTORY BOROUGHES.

ON Saturday, the 18th of February, the Committee being met, the two petitions were read. Both contained a general allegation that Edward Lewis, Esq. the petitioner, had a great majority of legal votes, and was duly elected (1).

Then the last determination of the House of the right of election was read; and after that, the standing order of 16 Jan. 173 $\frac{5}{8}$ (2).

The last determination is as follows:

12 November, 1690. Resolved, "That the

(1) Votes, 6 Dec. p. 21, 22.

(2) *Supra*, p. 99.

8 Dec. p. 56.

“ right of election of burgesſes to ſerve in Parliament for the borough of New Radnor, is in the “ *burgeſſes* of Radnor, Ryader, Knighton, Knucklas, “ and Kevenlice only (1).”

The only queſtion, in this caſe, was upon the ſenſe of the laſt determination.

The counſel for the petitioners inſiſted ; That by the word “ *burgeſſes*,” is meant, all burgeſſes, whether reſident or non-reſident ; and that by the ſtanding order of 1735, the counſel for the ſitting member were not at liberty to go into any proof of the contrary.

The counſel on the other ſide contended ; That, by the ſtanding order, the Houſe could never intend to prohibit the explanation of ambiguous or equivocal words in laſt determinations, and ſaid, that they only propoſed to explain the word “ *burgeſſes*” in the determination, and to ſhow that the Houſe muſt have underſtood by it, in this inſtance, not “ *burgeſſes at large*,” but “ *burgeſſes in-
habitato*.”

[319] The Committee were of opinion, that they were not precluded from ſuch explanation, by the ſtanding order of 1735 ; and, as the averment lay on the ſitting member, it was agreed at the bar, and conſented to by the Committee, that he ſhould be conſidered as *aſſor* in the cauſe, and that his counſel ſhould begin.

(1) Journ. vol. x. p. 469, col. 1, 2.

COUNSEL for the Sitting Member.

By the statute of 27 Hen. VIII. cap. 28. § 29. the counties and boroughs of Wales were first authorized to send members to Parliament. The 3d section of the statute of the 35th of the same King, cap. 11. is in these words:

“ Forasmuch as the *inhabitants* of all cities and
 “ boroughs in the twelve shires within Wales, and
 “ in the county of Monmouth, not finding bur-
 “ gesses for the Parliament themselves, must bear
 “ and pay the burgessees wages within the shire-
 “ towns of and in every the said twelve shires in
 “ Wales, and in the said county of Monmouth,
 “ (Be it enacted,) That the *burgesses* of all and every
 “ of the said cities, boroughs and towns, which be
 “ and shall be contributory to the payment of the [320]
 “ burgessees wages of the said shire-towns, shall be
 “ lawfully admonished, by proclamation or other-
 “ wise, by the mayors, bailiffs, or other head-
 “ officers of the said towns, or by one of them, to
 “ come and to *give their elections* for the electing of
 “ the said burgessees, at such time and place lawful
 “ and reasonable, as shall be assigned for the same
 “ intent by the mayors, (&c.) *In which elections*,
 “ the burgessees shall have like voices and authority
 “ to elect, name, and choose the burgessees of every
 “ the said shire-towns, like and in such manner
 “ as the burgessees of the said shire-towns have or
 “ use.”

It is evidently the object of this clause of the
 statute

statute to communicate a right of voting for the member of parliament, to the *inhabitants* of the boroughs which were contributory to the payment of his wages ; therefore, when it is enacted, that the *burgesses* of all the boroughs which shall be contributory to such payment shall *give their elections*, the meaning undoubtedly is, that the *burgesses inhabitants*, and they only, should have a right to vote. The right of election, therefore, being confined by an *act of Parliament* to the *burgesses inhabitants*, if the *resolution of the House* had in direct terms contradicted this act, it would have been *illegal*, till the statute of the 2nd of George the Second, which made every last determination final. Now, though there are perhaps, too many instances of last determinations which, when made, were clearly against law, yet, if the determination concerning New Radnor is capable of a construction agreeable to law, that construction ought to be adopted, rather than one in direct opposition to the words of a statute.

In the case of the borough of Denbigh and its contributory boroughs, in 174 $\frac{1}{2}$, the petitioners contended, " That the right of voting was in the *burgesses at large*:" they produced several returns in the reigns of Edward the Sixth, Elizabeth, Charles the First, Charles the Second, James the Second, William and Mary, George the First, and George the Second, and also several witnesses, to prove, that the several electors named in those returns were not *resident* *burgesses* of the boroughs, and to

prove

prove likewise, that the usage had been for *non-resident* burgesses to vote. On the part of the sitting members, the 29th section of the 27th of Henry the Eighth, cap. 28. and the third and fourth sections of the 35th of Henry the Eighth, cap. 11. were read: They called no witnesses. A motion was first made, and the question proposed, "That the right of election is in the burgesses *at large*, of," &c. To this an amendment was proposed, by leaving out the words "*at large*," and inserting the word "*inhabitants*" in their stead, and the question being put, "That the words "*at large*," stand part of the question," the House divided; and it passed in the negative. The question being then put, "That the word "*inhabitants*" be inserted instead thereof," the house again divided; and it passed in the affirmative. Then the main question being put, the House resolved, 7 Feb. 174 $\frac{1}{2}$,

"That the right of election of a burgess to serve [323]
 "in Parliament for the borough of Denbigh, in
 "the county of Denbigh, is in the *burgesses, inhabitants*
 "of the boroughs of Denbigh, Ruthyn, and
 "Holt, respectively (1)."

This case is exactly in point; the House, upon the ground of the statutes, determined that only *resident* burgesses have a right to vote.

In the case of Cardigan, indeed, the House, in 1730, thought proper, in the very face of the act of

(1) Journ. vol. xxiv. p 550, col. 2.

Henry the Eighth, to extend the right of voting to out-burghes, but even there they deemed it necessary to add the words "*at large*."

7 May, 1730. Resolved, "That the right of
" election of a burgeses, to serve in Parliament for
" the town of Cardigan, in the county of Car-
" digan, is in *the burgeses at large* of the boroughs
" of Cardigan, Aberystwith, Lampeter, and Atpar
" only. (2)."

[324] This expression, or some other of the same import, is familiar to the House, when they determine that the right of election extends to out-burgeses. Is it not therefore reasonable to conclude, that some such expression would have been made use of in the instance before the Committee, if the House had meant that the right was so in the boroughs in question?

In 1690, when the last determination was made, the question was not, Whether the out-burgeses had a right to vote; but, Whether the burgeses of Paines-castle and Presteigne had a concurrent right with those of the other boroughs. The numbers on the poll on that occasion, were so few, that it cannot be supposed that any out-burgeses voted. There were only 173 voted for Mr. Harley, and 172 for Sir Rowland Gwyn, besides 45 burgeses of Presteigne, and 34 of Paines-castle, who voted for Gwyn. The attention of the House not being called to the subject of the present controversy,

(1) Journ. vol. xxi. p. 574, col. 1.

NEW RADNOR.

nothing was said concerning residency or non-residency, and that point remained unaffected by the determination (A). [325]

By the charter of New Radnor, none can be burgeses in that place but inhabitants; therefore none but inhabitants can vote. It would be strange if the shire-town were to be more limited in this respect than the other small contributory boroughs.

☞ They offered to give this charter in evidence; but, as it bears date so late as the 12th of the late King, the reading it was objected to, for it was said that it could not affect the sense of a determination made so long before; and the Committee resolved that it should not be read.

Evidence was likewise offered to show, that, of late years, great numbers of burgeses had been made in the small contributory boroughs, sufficient to drown entirely the votes of the electors for the shire-town. This was objected to; it was said, that although it might prove the *abuse* of the right contended for by the petitioner, and might perhaps, on that account, be proper to be laid before the Parliament, if a remedy to that abuse should [326] be applied for, yet it was entirely improper for the consideration of a court appointed solely to try the *existence* of the right. The Committee rejected the evidence.

COUNSEL *for the Petitioner.*

The resolution of 1690 is so clear as not to
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require explanation; which, though necessary where the words are very ambiguous, is always a dangerous thing, and has too often furnished a pretext for overturning last determinations. "*Burgeffes*" is a general word, and as applicable to an out-burgeffs as to one who is resident in the borough. That when the word "*burgeffes*" is used, unqualified by any restraining epithet, it means "*burgeffes at large*," is clear from the case of Aldborough in Suffolk. On the 23d of December, 1709, the House had determined,

"That the right of electing burgeffes, to serve
"in Parliament for the borough of Aldborough,
"in the county of Suffolk, is in the bailiffs, bur-
"geffes, and freemen, not receiving alms (1)."

[327] On the 16th of June, 1715, a report was made from the Committee of privileges and elections on a petition from that borough, by which it appears that an attempt had been made, notwithstanding the determination of 1709, to limit the right to the burgeffes resident. This attempt had succeeded with the Committee, but *they* were sensible that the words used in 1709 would not admit of such a limited sense; they did not therefore endeavour to make an explanatory resolution, but they first resolved,

"That it is the opinion of this Committee, that
"the right of election of members to serve in Par-
"liament for the borough of Aldborough, in the

(1) Journ. vol. xvi. p. 257, col. 1.

“ county of Suffolk, is *not* in the bailiffs, burgesſes,
 “ and freemen, of the ſaid borough, not receiving
 “ alms.”

And then, having removed the former determination out of their way, they proceeded to another resolution, viz.

“ Resolved, That it is the opinion of this Committee, that the right of election of members to
 “ ſerve in Parliament for the borough of Aldbo- [328]
 “ rough, in the county of Suffolk, is in the bailiffs
 “ and burgesſes *reſident* within the ſaid borough,
 “ and not receiving alms (1).”

Does not this proceeding of the Committee demonstrate that, in their opinion, the word “ *burgesses*,” without any qualifying epithet, could not ſignify, in a limited ſenſe, only burgesſes *reſident*?—The Houſe did not agree to either of the resolutions of the Committee (2), ſo that the determination of 1709 continues to be the laſt determination of the Houſe, of the right of election in Aldborough.

In the caſe of Wells, 18 April, 1729, the Houſe reſolved,

“ That the right of election of citizens, to ſerve
 “ in Parliament for the city of Wells, in the county
 “ of Somerſet, is in the mayor, maſters, burgesſes,
 “ and freemen of the ſaid city, who are admitted
 “ to their freedom in any of the ſeven companies

(1) Journ. vol. xviii. p. 176,
 col. 1.

(2) Journ. vol. xviii. p. 176,
 col. 2.

“ within the said city, being thereunto entitled by
 “ birth, servitude, or marriage (1).”

And in consequence of that resolution, 11 March, 1734 $\frac{4}{7}$, counsel were restrained from giving evidence, “ that it is a necessary qualification of a burgesses of the city of Wells, that such person, previous to his being made a burgesses, was a freeman of the said city ; admitted to his freedom in one of the seven companies within the said city ; entitled to such freedom by birth, servitude, or marriage ” (2).

The last determination of the right of election in Chippenham is as follows:

9 April, 1624. Resolved, “ That the new
 “ charter alters not the custom ; and that the bur-
 “ gesses and freemen, more than twelve, have
 “ voice in the election (3).”

[330] 28 January, 174 $\frac{1}{2}$. The counsel for the petitioners insisted, that the words “ *burgesses* “ *and freemen*,” in the above determination, mean only, *such burgesses and freemen as are inhabitants, householders of the ancient houses, called free or burgage houses, within the said borough* (4). A motion was made, and the question being put, “ That in the
 “ last determination of this House, of the right of
 “ election of members to serve in Parliament for

(1) Journ. vol. xxi. p. 329, col. 1. See also Glanville, col. 2. p. 47.

(2) Journ. vol. xxii. p. 409, col. 2. (4) Journ. vol. xxiv. p. 65, col. 2. p. 66, col. 1.

(3) Journ. vol. i. p. 759,

“ the borough of Chippenham, in the county of
 “ Wilts, made the 9th day of April, 1624, (which
 “ is, &c.) the words “ *burgeffes and freemen*,” men-
 “ tioned in the said resolution, mean only such
 “ burgeffes and freemen *as are inhabitants, house-*
 “ *holders of the ancient houses, called free or burgage*
 “ *houses, within the said borough*; It passed in the
 “ negative (B).”

In the case of Seaford, 10 February, 167 $\frac{9}{1}$, the
 question being, Whether the right of election was
 in the bailiffs, freemen, and jurors, *only*, or in the
 populacy; the Committee, and the House, re-
 solved,

“ That the bailiff, jurors, and freemen, had not
 “ *only* voices in election, but that the election was in
 “ the *populacy* (1).”

10 December, 1761. A motion being made, [331]
 and the question put, “ That the counsel for the
 “ petitioners be admitted to give evidence, to shew
 “ that in the said determination (of 1670) the
 “ words “ *bailiff, jurors, and freemen*,” mean *such*
 “ *bailiff, jurors, and freemen only as are resident within*
 “ *the said town and port* ;” It passed in the negative
 (2). (C).

Those three cases shew how averse the House
 has always been from restraining the sense of general
 words in last determinations.—The case of Wells
 is particularly strong, for the words of the reso-
 lution of 1729 afforded a constructive argument

(1) Journ. vol. ix. p. 200,
 col. 2.

(2) Journ. vol. xxix. p. 83,
 col. 1.

in favour of the explanation contended for in 1734.

[332] It is said, that, if the determination in the case of Radnor had been intended to extend to the out-burgeses, the words "*at large*" would have been added; it is, at least, equally fair to say, that the words "*inhabitants*," or "*resident*" would have been added, if the House had meant "*burgesses*," in a limited sense. Such addition is often made use of by the House; and was in the case of Denbigh. A general word may require superadded words to restrain its meaning; it cannot require any to enlarge it.

As to the case of Denbigh, it will have little weight, if we consider the æra when it happened; the state of parties at that time; and that the numbers, on the first division, were but 177 to 174, and, on the second, only 175 to 174; so that the question was carried only by a majority of one. Every reasonable man will think that, at that time, if the two contending parties could have shifted their grounds, and each have taken that of his opponent, the determination would have been directly contrary to what it was. But, whatever our conjectures may be on that head, it is to be observed, that Denbigh was then a maiden borough; there was no prior determination to which the House, by virtue of the statute of George the Second (1), was bound to adhere, as there is in the case now before the Committee.

[333]

(1) 2 Geo. II. cap. 24. § 4.

If the words of the act of the 35th of Henry the Eighth were as clear and explicit as they are perplexed and equivocal, yet there are two answers to be given to the arguments drawn from that statute.

In the first place, constant usage in favour of the out-burgeses would be sufficient to annual the effect of such an obsolete law.

By the 1st of Henry the Fifth, cap. 1. the elected for cities and boroughs were to be *resiant*; dwelling, and free in the same cities and boroughs; and by that statute, and the 8th of Henry the Sixth, cap. 7. the 10th of Henry the Sixth, cap. 2. and the 23d of Henry the Sixth, cap. 14. as to knights of the shire, both the electors and the elected were to be *resiant* in the respective counties,

The provisions of these acts concerning residency were not formally repealed by the legislature till last year (1); yet there is not the smallest doubt but that subsequent usage had so far abrogated them, that the objection of non-residence would not have been admitted for more than two centuries before the 14th of George the Third, to vitiate the vote of a freeholder, or to avoid the election of a member of Parliament, otherwise duly qualified. The legislature itself, in the last-mentioned statute, has declared that the provisions in those of Henry the Fifth and his son, were

[334]

(1) 14 Geo. III. cap. 58.

become *obsolete* (D). Those statutes were as binding in Wales as in England; for by the 27th of Henry the Eighth, cap. 28. the law of England respecting elections is communicated to Wales.—When was it ever thought, in any controverted election for a Welsh county, or borough, that either of the parties could avail themselves of any of those statutes?

[335] In the second place, as has been acknowledged by the counsel for the sitting member, whatever the law might be before the determination in 1690, however repugnant it might be to that determination, still the right of election is to be according to the determination, and not according to any prior rule; for the effect of the statute of the 2d of George the Second (1) is to give to every last determination in the House of Commons on the right of election, the force of an act of Parliament, and to operate the repeal of any thing antecedent and contrary to such determination.

In other Welsh boroughs, the right of election has been determined to be in the burgessees, *generally*, notwithstanding any thing contained in the statutes of Henry the Eighth. Besides the case of Cardigan, which has been cited on the other side, those of Caermarthen and Pembroke are proofs of this position.

19 March 1727⁸. Resolved, "That the right

(1) 2 Geo. II. cap. 24. § 4.

“ of election of burgesſes, to ſerve in Parliament
 “ for the borough of Caermarthen, is in the bur-
 “ geſſes of the ſaid borough (1).”

23 February, 17 $\frac{1}{2}$. Reſolved, “ That the
 “ mayor and burgeſſes of the ancient borough of [336]
 “ Wiſton, in the county of Pembroke, have a
 “ right to vote in the election of a member to
 “ ſerve in Parliament for the borough of Pem-
 “ brook (2) (E).”

If it has been proved that in the language of the
 Houſe of Commons, the word “ *burgeſſes*” in-
 cludes both reſident and out-burgeſſes, theſe two
 caſes are to be conſidered as inſtances to be added
 to thoſe of Radnor and Cardigan, where the Houſe
 diſregarded any inferences that might be drawn
 from the ſtatutes of Henry the Eighth, againſt the
 right of out-burgeſſes.

It has been alledged, that reſidence or non-reſi-
 dence was not the point in litigation in 1690;
 but there is no rule which ſays, that, to make a
 laſt determination final, as to any particular point,
 that point muſt be directly litigated (3); and cer-
 tainly the queſtion was, in general “ What is the
 “ right of election?”

In the caſe of Cardigan, the point of reſidency [337]
 was one of thoſe on which the parties were directly
 at iſſue; for it appears, by the Journals, that the

(1) Journ. vol. xxi. p. 90, col. 2. 110, col. 2.
 col. 2.

(3) Vide *infra*, Caſe of

(2) Journ. vol. xvii. p. 109, Pontefract.

counsel for Mr. Lloyd insisted, that the right was in the burgesſes (*generally*) of Cardigan, Aberystwith, Lampeter, and Atpar; and the counsel for Mr. Powell contended, that it was only in the burgesſes *reſident* (1).

In the caſe of Pembroke, the act of the 35th of Henry the Eighth was referred to.

Nay, in the caſe of Flint, where the right of election was determined to be only in the *inhabitants*, it appears, by the Journals, that the Houſe proceeded, not on the ground of the ſtatute of the 35th of Henry the Eighth, but on evidence that ſuch had been the conſtant uſage (2).

[338] The counsel for the petitioner offered, if it ſhould be thought neceſſary, to produce evidence to ſhow, by inference, that out-burgesſes voted at the election for New Radnor in 1690. But this was not required, either by the Committee, or the counsel on the other ſide.

On Monday, the 20th of February, the Committee, by their Chairman, informed the Houſe that they had determined,

That Edward Lewis, Eſq. the petitioner, was duly elected, and ought to have been returned (3).

(1) Journ. vol. xxi. p. 573, p. 173, to p. 175.
col. 1.

(3) Votes, p. 250.

(2) Journ. vol. xxi. from

N O T E S

ON THE CASE OF

NEW RADNOR.

PAGE 181. (A.) Mr. Gray reports from the Committee of privileges and elections, "Upon the petition of Robert Harley, Esq. complaining of an undue return and election of Sir Rowland Gwyn for the borough of New Radnor;

Note
(A.)

"That the question between the petitioner and sitting member was, concerning the right of election.—That the petitioner insisted, that the right of election lay in the burgesses of Radnor, Ryader, Knighton, Knucklas, and Kevenlice only—That the sitting member insisted, that Paines-castle and Presteigne, had an equal right in electing with the said other towns." Journ. vol. x. p. 469. col. 1.

P. 330. (B.) The case of Chippenham was as follows. The counsel for the petitioners insisted, "That the words, "*burgesses and freemen*," mentioned in the last determination, mean only such burgesses and freemen, as are *inhabitants*, householders of the ancient houses, called free, or burgage houses, within the said borough." They went into evidence to prove that the usage, since 1624, had been

Note
(B.)

[340]

Note
(B.)

been for such persons *only* to vote. The counsel for the sitting members, alledged, "That the words "*burgesses and freemen*," mentioned in the said last resolution mean persons *possessed* of ancient burghage houses, within the said "borough." They also went into evidence to prove that the usage had been agreeable to their position. It appears from the tendency of the evidence produced on both sides, that both *inhabitancy*, and a certain form of admission to freedom, were contended for by the petitioners, and denied to be necessary by the sitting members. The cause was tried at the bar of the House. There was a division on the question, and it passed in the negative, only by a majority of one, 236 to 235. The tellers for the Noes were Sir John Hynde Cotton, and Mr. Lyttleton; for the Yeas, Mr. Secretary at War, and Mr. Fox. It is obvious that this case is liable to the same objections as that of Denbigh, (p. 332.) Neither is it entirely in point to the purpose for which it was cited; for it seems that the House admitted evidence of usage subsequent to the last determination, tending to put a *limited* construction on *general* words used in that determination.

Note
(C.)

[341]

P. 331. (C). So far that case is in point; but, in the same case, a few days afterwards, the House resolved, Dec. 15. "That the word "*populacy*," in the last determination, extends only to the inhabitants, housekeepers of the "said town and port, paying scot and lot." Journ. vol. xxix. p. 90. col. 1. By this resolution a restricted sense was put upon a very general term in a last determination.

☞ It may be proper to take notice, that there is a very great error, in the manner in which the resolution of the 10th of February, 1670, is stated in the book of the Law of Elections, p. 307.

Note
(D.)

P. 334. (D). The word "*obsolete*," in the statute of the 14th of George the Third, cap. 58. seems to be taken

in its popular sense, and is, perhaps, an expression which ought not to have been used in an act of Parliament. It is an established maxim of the law of England, that no statute can lose its validity, by mere disuse, or *desuetude*, as it is termed in Scotland; though that disuse may have continued for centuries. In the printed editions of the statutes, those acts which have lost their effect *consequently* by the annihilation of the subjects on which they could operate, are called *obsolete*; in contradistinction to such as are positively *repealed* by subsequent statutes.

The history of the statutes of Henry the Fifth, and Henry the Sixth, concerning residency, seems indeed to favour the notion that, even in England, a law may be abrogated by disuse, for there are many instances in the Journals where objections drawn from those statutes have been disregarded or over-ruled by the House of Commons, and the judges of Westminster-hall seem to have paid as little regard to them.

In the case of Denzell Onslow against Rapley, bailiff of Haslemere, (which was an action for a false return, tried at the Assizes in Surrey, 20 July, 1681, before Sir Francis Pemberton, Chief Justice of the King's Bench), "The defendant's counsel first insisted on the statute of the 1st of Henry the Fifth, cap. 1. that a person elected must be free, *resiant and dwelling* within the borough. To which it was answered, and *resolved by the court*; That little or no regard was to be had to that ancient statute, for as much as the common practice of the kingdom had been, ever since, to the contrary; and it was the way to fill the Parliament house with men below the employment; and the objection was disallowed." See this case as reported in a little tract of Lord Somers, first published in 1681, and re-printed in the 4th edition of his State Tracts. Vol. i. p. 374.

[342]

But there is a case in the Journals of the reign of James the

Note
(D.)

[343]

the first, where Sir Edward Coke puts the neglect of the statutes of residency on a more constitutional ground. Sir Thomas Beaumont and Sir George Hastings being candidates for Leicestershire, the latter had the majority of voices, but because he was not *resiant* in the county, Beaumont was returned. The matter came before the House 12 Feb. 1628. Counsel were heard at the bar; and the statutes of the 1st of Henry the Fifth, and of the 8th and 23d of Henry the Sixth, were urged against the eligibility of Hastings. In the debate, Sir Edward Coke treated those statutes as *directory*, not *conclusory*, and said direction was matter of order, which maketh nothing void; and that the meaning of the act was only that such should be chosen as knew the state of the country, and the grievances thereof. Upon the question, it was resolved; that Beaumont was not duly elected, and that Hastings was; and the *sheriff* (1) was ordered to alter the return accordingly, Journ. vol. i. p. 516.

Note
(E.)

P. 336 (E). In this case of Pembroke, it was contended for the sitting member, "That the right of election for the borough of Pembroke, is in the mayor, bailiffs, and burgeses of the borough of Pembroke and Tenby only." For the petitioners it was alledged, "That it was in the mayor, bailiffs, and burgeses, of the severall boroughs of Pembroke, Tenby, and Wiston." The point of *residency*, therefore, was not in issue. The statute of the 35th of Henry the Eighth was only read to prove the right of burgeses of the contributory boroughs, to vote at the election for the shire-town.

(1) *Vide supra*, Introduction, Note (W), p. 92.

IX.

THE

C A S E

Of the BOROUGH of

D O R C H E S T E R,

In the County of DORSET.

The Committee was chosen on Tuesday, the 21st of February, and consisted of the following Gentlemen :

Frederick Montagu, Esq. Chairman	} Members for	Higham Ferrers.
Sir William Codrington, Bart. -		Tewkesbury.
John Dyke Ackland, Esq. - - -		Callington.
William Drake, Esq. - - - -		Agmondesham.
William Drake, Esq. jun. - -		Agmondesham.
Richard Aldworth Neville, Esq. -		Grampound.
Afsheton Curzon, Esq. - - -		Clitheroe.
Sir Thomas Frankland, Bart. -		Thriske.
Sir Harbord Harbord, Bart. - -		Norwich.
Sir George Cornwall, Bart. - -		Herefordshire.
Sir William Guise, Bart. - - -	Gloucestershire.	
Charles Brett, Esq. - - - -	Lestwithiel.	
Sir John Moleworth, Bart. - -	Cornwall.	
N O M I N E E S.		
Lord John Cavendish - - - -	} Members for	York.
Sir Edward Ashley, Bart. - - -		Norfolk.

P E T I T I O N E R S :

Anthony Chapman, Esq.

Several Inhabitants and Electors of the Borough of
Dorchester.

Sitting Members :

William Ewer, Esq. John Damer, Esq.

Counsel for the Petitioners :

Mr. Cox, Mr. Lee.

For Mr. Ewer :

Mr. Mansfield, Mr. Rooke.

For Mr. Damer :

Mr. Bearcroft, Mr. Batt.

T H E
C A S E

Of the B O R O U G H of

D O R C H E S T E R.

ON Wednesday, the 22d of February, when the Committee met, the two petitions were read.

The first set forth, *in general*; That the petitioner, Chapman, had a majority of legal votes, and ought to have been returned (1).

The other alledged, *specially*; That divers persons were admitted to vote, who were neither “ inhabitants, nor *occupiers* of real estates within the “ borough,” and had no right (2).

The last determination of the right of election, being read, appeared to be as follows :

18 May, 1720. Resolved, “ That the right [348]
“ of electing burgeses, to serve in Parliament for

(1) Votes, 6 Dec. p. 22.

(2) *Ibid.* 17 Dec. p. 91.

“ the borough of Dorchester, in the county of
 “ Dorset, is in the *inhabitants* of the said borough
 “ paying to church and poor, in respect of their
 “ personal estates; and in *such persons* as pay to
 “ church and poor, in respect of their real estates
 “ within the said borough (1).”*

Then the standing order of 173 $\frac{5}{8}$ was read (2).

The numbers on the poll were,

For Ewer	-	-	-	-	-	-	232
For Damer	-	-	-	-	-	-	214
For Chapman	-	-	-	-	-	-	145

But the counsel for Chapman alledged, That, if they were right in their construction of the determination of the right of election, the numbers of legal votes would be,

For Chapman	-	-	-	-	-	-	118
For Ewer	-	-	-	-	-	-	112
For Damer	-	-	-	-	-	-	112

[349] This state of the votes, upon that supposition, was not admitted by the counsel for the two fitting members; however, it was agreed by all the counsel, and the Committee, that the question concerning the construction of the last determina-

(1) Journ. vol. xix. p. 363, § 25 to 32). *Vide* the Case of
 col. 2. Dorchester, 1791. 1 Fras. p.

[* For a determination explanatory of this resolution (under 28 Geo. III. cap. 52. 359, 360.) (2) *Supra*, p. 99.

tion should be separately argued and determined.

The counsel on the part of the petitioners contended, That the last clause of the determination means only, "Such as are *occupiers* of real estates within the borough; and, in respect thereof, pay to church and poor."

The counsel for the sitting members maintained, That it means, "Owners of real estates within the borough *paying* in respect thereof to church and poor, whether such real estates are in their own *occupation*, or not."

On the part of the petitioners, a witness, of the name of Pitman, who remembered the election in 1720, was called to prove that no persons who were merely *owners*, and were neither *occupiers* of real estates, nor inhabitants, voted at that election; but it appeared from his testimony that, of a list of persons whom he remembered to have polled at that time, there were ten out-voters, as they are called, or persons who were merely owners; and the counsel for the sitting members offered to prove, that several others had voted on the same occasion; but the Committee said they were satisfied, and did not require any farther evidence on that head. [350]

The usage since 1720 was admitted to be in favour of out-voters.

COUNSEL for the *Petitioners*.

When the House of Commons, or the legislature,

ture, mention "*paying*," they must be construed to mean *legal payment*; as when they speak of a *freehold*, they are understood to mean a *legal freehold*. In deciding the question before them in 1720, the House must be presumed to have decided it with a reference to legal rights, authorities, and impositions. The poor rate is a tax upon inhabitants, or *occupiers*, only; as is clear, both from [351] the words of the statute of the 43d of Queen Elizabeth (1), and the construction which has been put upon them in Westminster-hall. Lord Raym. 1280 (A).

That the church-rate is also a tax only on inhabitants or occupiers, is proved by a variety of authorities, particularly by Jefferies' Case in the 5th part of Coke's Reports, page 66, and by the 2d part of Rolle's Abridgement, p. 289 and 291, and Gibson's Codex, p. 220. col. 2. (B).

If the owners of real estates in Dorchester are *de facto* rated, yet they never can be compelled to pay the rates: They cannot be distrained upon for them. The rates in Dorchester have always been intituled, "Rates on the several *occupiers* of lands, "houses, &c." In 1772, an attempt was made to alter the words in the title, and to make it run thus, "Rates on the several *owners*, or occupiers, " &c." but, at a vestry holden for that special purpose, these words were rescinded, by an order which is entered in the vestry-books, and the customary title restored.

(1) 43 Eliz. cap. 2.

(This

(☞ This was proved by the books, and by parole evidence).

This circumstance shows, that it is well known, even in this borough, that mere owners are not liable to be rated to the poor.

The reason why the word "*inhabitants*" is used in the first clause of the determination, and "*persons*" in the second, is this (and it shows the House to have formed their decision with a view to the legal payment of rates): a person may be an *occupier* of land without living on it; and, for land, *occupancy* without *inhabitancy*, subjects the person occupying to the rates both for the poor and church (B).

COUNSEL for the Sitting Members.

The resolution in 1720 does not mention persons *rated* or *rateable*, but persons *paying* to church and poor; that is, those who, *in fact*, do pay. The House had then in contemplation the usage of the place, and not the statute of Queen Elizabeth. In Dorchester, as in most places of the West of Eng-
land, the established usage is, that the owner pays the poor-rate; and in other parts of the kingdom, when there is reason to apprehend that the occupier is in danger of becoming 'chargeable to the parish, they frequently rate the owner, to prevent such occupier from gaining a settlement. If the owner pay, and neither he nor the parish complain, the payment is *legal* as against all strangers. If the owner is rated, and submit, without appealing

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within the time allowed for that purpose by act of Parliament (1), he cannot afterwards set aside the rate, or recover from the parish the money he may have paid. In truth, the rate in all cases is ultimately paid by the owners; for when the tenant pays it in the first instance, there is a proportionable diminution of the rent he pays to his landlord.

[354] As to the church-rate, the canonists are much divided about it, and different persons are holden to be liable according to the purposes for which it is imposed, either of supporting the edifice or of supplying it with bells, plate, and other ornaments (C).

Dorchester is a borough by prescription, and the determination of 1720 must be considered as a *declaration* of the prescriptive right of election. It ought not therefore to be interpreted with any reference to the statute of Queen Elizabeth; there were parish payments to the poor before that statute; and it cannot be shewn, that owners were not, as well as occupiers, liable to those payments.

If the House had meant to declare the right of election to be as the counsel for the petitioners contend, they would have used the same language as they have done in other cases, where the right is conformable to their position; and, instead of expressing themselves as they have done, they would

(1) 17 Geo. II. cap. 38. § 4.

D O R C H E S T E R.

have decided, "That the right of voting is in the *inhabitants paying scot and lot*."

Houses are the only real estates in the borough of Dorchester for which votes are claimed; the *occupiers* of those houses *must* be *inhabitants*; therefore, if the House had meant to say, that the right of voting for real property in this borough, is only in those who are in the actual occupation of that property, would not "*inhabitants*" have been the word used for both classes of voters? [355]

The best rule for the construction of any determination of the House, where the sense is supposed to be *doubtful*, is, to compare it with the antecedent usage, the circumstances of the particular case which gave occasion to it, and the subsequent usage.

It appears, by a petition from this borough in 1690, 3 April, that persons, who were not inhabitants, had voted at two or three elections previous to that time; and if we consider the infrequency of Parliaments in James the Second's reign, and at the end of Charles the Second's, and their duration at the beginning of that of the latter, we shall find that this will carry the usage at least up to the Restoration.

It has been proved by a witness, called to establish the contrary (1), that ten persons, not inhabitants or occupiers, polled in 1720, at the election which gave occasion to the determination in question, and [356]

(1) *Supra*, p. 349, 350.

a great many more might have been shewn to have voted at the same time. Mr. Speke, one of the five people who signed the petition of the electors that year, is one of those out-voters whom the witness, produced on the part of the petitioners, remembers to have polled.

The petition set forth, "That the right of election is, and, beyond the memory of man, has been, in the inhabitants paying to church and poor in respect of their personal estates, and *in all persons* paying to church and poor for, or in respect of, any real estates *they are seised or possessed of* within the said borough."

Now these are almost the very words of the determination; the sense, as to the distinction between ownership and occupation, is exactly the same; to deny this, is to suppose that Mr. Speke, as an elector, would have petitioned the House of Commons in support of a right of election, by which it would appear that he himself had no title to vote,—nor to petition, as not being a party at all concerned in the cause.

The usage since 1720 is unquestionable, and unquestioned.

If the Committee were to give their assent to all the doctrine of the counsel for the petitioners on the subject of the legal payment of rates, still as it follows, as well from the circumstances of the case in 1720, and the previous and subsequent usage, as from the obvious sense of the words of the last determination, that the House could not have that doctrine

doctrine in contemplation when the determination was made, but, on the contrary, must have meant to describe owners of real estates who were *de facto* payers of the rates, the decision of the point now in litigation must be as contended for on the part of the sitting members. In the late case of New Radnor, the counsel on one side contended, with great appearance of reason, that the construction which those on the other side put upon the last determination was contrary to a positive act of Parliament; but antecedent and subsequent usage, and the plain sense of the words, being in favour of that construction, the Committee adopted it in deciding the cause. [358]

The counsel having closed their arguments on the meaning of the last determination, the Committee cleared the court, and deliberated among themselves. After which, the counsel being called in, the Chairman informed them that the Committee had come to the following resolution:

Resolved, "That it is the opinion of this Committee that, pursuant to the last determination of
 " the House of Common, such persons as pay to
 " church and poor in respect of their real estates
 " within the borough of Dorchester, in the county
 " of Dorset, though not inhabitants, or occupiers, were entitled to vote at the last election
 " of burgessees to serve in Parliament for the said
 " borough."

The counsel for the petitioners, on being informed of this resolution, said they were instructed

strusted not to give the Committee any further trouble.

In the course of the cause, the following questions of evidence arose.

[359] The counsel for the sitting members called one of the present overseers of the poor for Dorchester, who offered to produce the parish books in which the rates of several years were entered, together with the sums of money collected.

This was objected to.—It was said, that the original rates were better evidence, and, as they might be procured, the book ought not to be received.

On the other hand, it was said, that all the parish officers had been served with notices to produce the original rates, but that it appeared that those originals could not be found, and that this was not extraordinary, since the rates are generally made on detached pieces of paper, and for the most part, lost or destroyed after they had been transcribed into a book (1).

The Committee over-ruled the objection.

When Pitman (2) was called to prove that no out-voters had polled in 1720, he acknowledged that he was an *inhabitant* having a right to vote in respect of his personal estate.

[360] The counsel for the sitting members insisted, That his evidence on the right of election was inadmissible; That he was an interested witness, and must be inclined to have the out-voters excluded,

(1) 17 Geo. II. cap. 38. § 13. (2) P. 349.

which would diminish the number of electors, and, thereby enhance the value of the votes which remained.

It was answered, That a vote was not like certain other rights, as a right of common, whose value is diminished by encreasing the number of those who have a concurrent title ; That with regard to such rights, the objection now made would be good, as the testimony of the witnesses might affect the pecuniary value of his own estate ; but that a vote, in the eye of the law, has no value analogous to those other rights which are saleable property ; That the vote of an individual is not supposed to sink in its value, by an increase of the number of other electors ; and that the constant practice has been to admit a voter, under an undisputed title, to give evidence of the right of election (D).

The Committee over-ruled this objection.

[361]

On Thursday, the 23d of February, the Committee, by their Chairman, informed the House, that they had determined,

That the two sitting members were duly elected (1).

(1) Votes, p. 265.

N O T E S

ON THE CASE OF

D O R C H E S T E R.

Note
(A.)

PAGE 351. (A). The churchwardens and overseers of the poor of every parish, or the greater part of them, shall "raise weekly, or otherwise, by taxation of every *inhabitant*, parson, vicar and other, and of every occupier of lands, houses, tithes impropriate, propriations of tithes, coal-mines, or saleable underwoods in the said parish," competent sums for the necessary relief, &c. 43 Eliz. cap. 2. § 1.

"The farmer and *occupier* shall pay this tax, and not the landlord. Lord Raym. 1280.—And the reason why the occupier is to be so charged, is, that the poor-rate is not a charge upon the land, but upon the occupier in respect of the land." Fitzgibb. 297.

[Note
(B.)

P. 352. (B). In Jefferies' case, the court of King's Bench, after having taken the opinion of several canonists, determined, "That a tax for repairing the church is payable by an *occupier* of lands in the parish, though he do not inhabit upon them, nor in the parish; that he is, to that effect, a parishioner; but that, when there is a farmer inhabits upon the lands, the lessor who receives the rent shall not be charged; and, that a church-rate is on the person

[363]

“ person, but in respect of the land.” 5 Co. f. 67. b.—
In 2 Rolle’s Abr. p. 289. and in Gibson’s Codex, vol. i.
p. 220. col. 2. the same doctrine is laid down, and Jefferies’
case cited.

Note
(B.)

P. 354. (C.) “ For the ornaments of a church only the
“ *inhabitants* are to be rated; and that in respect, not of
“ their lands, but of their personal estate. Therefore the
“ man who occupies land in one parish, and lives in another,
“ is not rateable for the ornaments of the church in the
“ first.” 2 Roll. Abridg. p. 291. “ A rate for the repa-
“ ration of the fabrick of a church is real, charging the
“ land, and not the person; but a rate for ornaments is
“ personal upon the goods, and not upon the land.” Gib-
son’s Cod. *loc. cit.* It appears from Gibson that this has
been determined in a variety of cases.—“ Under ornament
“ are comprehended seats in a church, and bells; and to be
“ rateable for them inhabitancy is necessary, and not merely
“ occupancy.” *Ibid.*

Note
(C.)

P. 360. (D): It appeared that Pitman had also a right
to vote as the *owner* of a real estate. Therefore, since he
had two titles, and although a change of situation should
afterwards annul one, would still, if both should be confirmed
by the Committee, continue to enjoy the other, it could not
be his interest to overthrow either.

Note
(D.)

X.

THE

C A S E

Of the BOROUGH of

T A U N T O N,

In the County of SOMERSET.

The Committee was chosen on Friday, the 24th of February, and consisted of the following Gentlemen:

Frederic Montagu, Esq. Chairman	} Members for	Higham Ferrers.
Sir James Pennyman, Bart. - -		Beverley.
Abel Smith, Esq. - - - - -		Aldbro', York.
Herbert Mackworth, Esq. - -		Cardiff.
Hon. Charles Marsham - - -		Kent.
Sir Watkin Williams Wynn, Bart.		Denbighshire.
Beaumont Hotham, Esq. - - -		Wigan.
Sir Henry Bridgeman, Bart. - -		Wenlock.
Francis Annesley, Esq. - - -		Reading.
Sir William Bagot, Bart. - - -		Staffordshire.
Christopher Griffith, Esq. - -	Berkshire.	
Jacob Wilkinson, Esq. - - -	Berwick.	
Anthony James Keck, Esq. - -	Newton, Lancash.	
N O M I N E E S,		
<i>Of the Petitioners :</i>		
Hon. Thomas Howard - - -		St. Michael.
<i>Of the Sitting Members :</i>		
Viscount Lisburne - - - - -		Cardiganshire.

P E T I T I O N E R S :

Alexander Popham, Esq. and John Halliday, Esq.
 Several Inhabitants and Electors of the Borough of Taunton.

Sitting Members :

The Hon. Edward Stratford, Nathaniel Webb, Esq.

C O U N S E L,

For the Petitioners :

Mr. Lee, Mr. Morris.

For the Sitting Members :

Mr. Gould, Mr. Hotchkin.

THE
C A S E

Of the BOROUGH of

T A U N T O N.

ON Saturday, the 25th of February, the Committee being met, the two petitions were read, setting forth ;

That the mayor, as returning officer, had procured himself to be appointed mayor, to answer election purposes, and had, by unnecessary adjournments, protracted the poll from the 10th of October, when it began, to the 18th ; and that he had rejected many legal votes which were tendered for the petitioners, Popham and Halliday, and admitted many illegal votes for the sitting members ;

That the petitioners were duly elected by a great majority of legal votes, and ought to have been returned ;

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T

That

That the sitting members previous to, and during the election, were guilty of bribery and corruption, by themselves and agents (1).

It was admitted, by the counsel for the petitioners, that the mayor was *legally* elected; but a great deal of evidence was gone into, to shew that he was not advanced to the mayoralty in regular rotation, but had got into the office for the purpose of promoting the interest of the sitting members, and had acted as the petition stated, at the election.

After a considerable time had been spent in hearing this sort of evidence; the Chairman, by the direction of the Committee, asked the counsel, whether they wished to lay such a charge against the returning officer as might induce the Committee to report *especially* against him; or whether they intended to affect the numbers on the poll, by any undue act or acts of the returning officer. The answer to both questions was in the negative.

[369] They said, they only meant to give a general idea of his partiality. Upon this, the Chairman, by order of the Committee directed them to proceed to the next point in the case. The Committee, therefore, neither acquitted nor condemned the returning officer, but were of opinion, that the enquiry into his conduct was not necessary to the decision of the merits of the election, and consequently waved such enquiry.

(1) Votes, 6 Dec. 1774, p. 22, 23.

The last determination of the right of election in Taunton is in the following words :

28 July 1715. Resolved, " That the right of *Right of*
 " election of burgesses to serve in Parliament for *voting.*
 " the borough of Taunton, in the county of Somers-
 " set, is in the *inhabitants* within the said borough,
 " being *pot-wallers*, and not receiving *alms* or *cha-*
 " *rity* (1).

When this resolution was moved, an amendment was proposed to the question, by leaving out the words, "*or charity*;" and the question being put that the words "*or charity*" do stand part of the question; it was resolved in the affirmative; and then the main question was put; and was resolved in the affirmative (2). This proves that, in the borough of Taunton, there is a clear distinction between *alms* and *charity*, which was admitted by the counsel on both sides. "*Alms**" means parochial collection, or parish relief. "*Charity*" signifies sums arising from the revenue of certain specific funds which have been established or bequeathed for the purpose of assisting the poor. There are a great many of those funds in Taunton, called the

(1) Journ. vol. xviii. p. 241, ' by the parish; and also per-
 col. 2. ' sons never rated; or persons

(2) Journ. *loc. cit.* ' who although rated were

[* In the Case of *Colchester*, ' never called upon to pay;
 March 1789, the Committee ' and persons to whom, being
 determined, ' That persons ' rated and having paid, the
 ' rated to the poor, but who, ' rate had been returned, were
 ' on their own application, ' not disqualified "*as receiving*
 ' have been excused payment ' *alms.*"]

Town-charity, Meredith's charity, Saunders's charity, &c.

[371] It was agreed, on both sides, that neither alms, nor charity, disqualify an elector in Taunton, unless they have been received within a year before the election. On the 27th of August, 1715, (on occasion of the petition which gave rise to the determination of the right of election) the question being put, "That the counsel for the fitting member be admitted to give evidence of persons having received Saunders's charity before the 2d of February, 171 $\frac{1}{2}$, (which was exactly a year before the election);" It passed in the negative (1).

It was agreed, That a *pot-waller* is a person who furnishes his own diet, whether he be a householder, or only a lodger./2./

And it was agreed, That to be a pot-waller qualified to vote in Taunton, it has always been understood, both before and since the determination in 1715, that such person must have a legal parochial settlement in the borough./3./ The counsel for the fitting members thought, that gentlemen of fortune were excepted out of this rule, but there does not seem to be any principle on which such a distinction can be supported.

The counsel for the petitioners said, That the Journals of the House have recognized that apprentices cannot be pot-wallers qualified to vote.—
Quer.

(1) Journ. vol. xviii. p. 286, col. 2.

(2) *Contra* in *Honiton*, 3 *Lind.* 159. *Hechester* 402. *The 3^d Dory*

(3) *No* in *Hechester*, 1 *Lind.* 464. 3 *Dory* 154.

Circumstances 2 *Trayer*, 447.

2 *Hechester* 2 *Pick* 244.

All Parishes have no port settlement. Minchhead/Rich

The numbers on the poll, as produced by the [372]
returning officer, were as follows :

For Webb - - - - -	260
For Stratford - - - - -	254
For Halliday - - - - -	202
For Popham - - - - -	201

The counsel for the petitioners proposed to disqualify of the voters for the sitting members,

114. As having received the town charity.

2. As having received the churchwarden's charity.

3. As Chelsea pensioners.

19. As not having settlements in Taunton.

15, or 16. As not answering the definition of pot-wallers.

2, or 3. As certificate-men.

2. As apprentices.

2. As bribery agents.

If they succeeded in this, they said there would remain a clear majority for the petitioners, but that, at all events, for they did not foresee what objections there might be to their own votes, they would prove the charge of bribery so directly and palpably, as to disqualify the sitting members, and make the election void as to them (1). [373]

In the course of the cause it was settled that Chelsea pensioners might vote.

Posterior to the determination in 1715, in the progress of the same cause, it was made an objec-

(1) See the Case of St. Ives, *infra*, Note (B).

7. As having no settlement.

7. As not answering the definition of pot-wallers.

3. As certificate-men.

They also endeavoured to prove bribery on the petitioners.

I only heard the openings of the counsel on each side (1). The cause lasted from the 24th of February to the 16th of March.

On Thursday, the 16th of March, the Committee, by their Chairman, informed the House that they had determined,

[375]

That John Halliday, Esq. and Alexander Pop- ham, Esq. were duly elected, and ought to have been returned (2).

‘ parish or place whatsoever ; ‘ tolls, or toll-house, shall be
 ‘ and no tolls to be taken at ‘ rated or assessed, towards the
 ‘ any gate erected, or to be ‘ payment of any poor’s rate,
 ‘ erected, by the trustees of ‘ or any other public or paro-
 ‘ any turnpike road, nor any ‘ chial levy whatever.’ 13
 ‘ toll-house erected or to be Geo. III. c. 84. § 56.]
 ‘ erected for the purpose of (1) *Vide supra*, p. 41.
 ‘ collecting the same, nor any (2) Votes, p. 379, 380.
 ‘ person, in respect of such

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XI.

THE
C A S E

Of the BOROUGH of

P O N T E F R A C T,

In the County of YORK.

The Committee was chosen on Tuesday, the 28th of February, and consisted of the following Gentlemen:

Lord Charles Spencer, Chairman	Members for	Oxfordshire.
Lord Advocate of Scotland - -		Peeblesshire.
Edward Southwell, Esq. - - -		Gloucestershire.
Thomas George Skipwith, Esq. -		Warwickshire.
Paul Methuen, Esq. - - - -		Bedwin.
John Smith, Esq. - - - - -		Bath.
Charles Anderson Pelham, Esq. -		Lincolnshire.
Solicitor General of Scotland -		Edinburghshire.
William Adam, Esq. - - - -		Gatton.
Charles Penruddocke, Esq. - -		Wiltshire.
John Scudamore, Esq. - - - -		Hereford.
William Egerton, Esq. - - - -		Brackley.
Sir Roger Mostyn, Bart. - - -		Flinthshire.
NOMINEES,		
<i>Of the Petitioners :</i>		
George Johnstone, Esq. - - -		Appleby.
<i>Of the Sitting Members :</i>		
Lord George Germaine - - -		East Grinstead.

PETITIONERS:

The Hon. Charles James Fox, and James Hare, Esq.
Several Inhabitants, Householders, and Electors of the
Borough of Pontefract.

Sitting Members:

Sir John Goodricke, Bart. Charles Mellish, Esq.

COUNSEL,

For the Petitioners:

Mr. Lee, Mr. Alleyne.

For the Sitting Members:

Mr. Mansfield, Mr. Bearcroft.

THE
C A S E

Of the BOROUGH of

P O N T E F R A C T .

ON Wednesday, the first of March, when the Committee met, the two petitions were read (1), and it appeared, that the only question in the case was concerning the right of election in the borough of Pontefract : Whether a resolution of 1624, or one of 1770, was to be considered as the last determination in the House of Commons, within the meaning of the statute of George the Second.

If the first was that determination, Mr. Fox and Mr. Hare had an unquestionable majority, and were duly elected ; and *vice versa*.

On the opening of the cause, it became a matter of dispute among the counsel, whether any, or [380]

(1) Votes, 6 Dec. p. 24, 25.

which,

which, of those two resolutions should be read, before the argument should be gone into concerning them. If one of them were read, it was said, that the standing order of 173 $\frac{5}{8}$ might be then thought to attach upon it, so as to bar the counsel from giving evidence to contradict it.

The Committee agreed that both should be read.

The counsel for the sitting members alledging that they doubted how far the entry of 1624 in the printed Journals was a true copy: the Committee resolved, that the original should be sent for.—But, on examination, it appeared that the writing could not be read but with great difficulty (A). On which it was agreed that the resolution should be read from the printed copy, and that, if either of the parties should object to any part of it, reference should then be made to the original.

There are two Journals of that period.

[381] In the first, (intituled “Originals of the session
“ of Parliament, holden at Westminster, 19^o Fe-
“ bruarii, 21^o Jacobi) (1), there is the following
entry:

28 May 1624. “Mr. Glanvyle reporteth,

“For Pomfrett, two points: 1. Who the elec-
“tors—*Resolved by the Committee, there being no*
“*charter, nor prescription, for choice, the election is to*
“*be made by the inhabitants, householders, residents.—*
“Resolved also so now, upon the question.—

(1) Journ. vol. i. p. 760.

“ 2. That

“ 2. That the Committee also of opinion, in respect the poll demanded, though interrupted by Beamont, yet the poll not being pursued, the choice of Sir Jo. Jackson void, and a new warrant to issue for a new choice (1).”—

In the other, (intituled, “ *Prima sessio Parliamenti inchoat. apud Westm. decimo nono die Februarii, anno regni regis Jacobi, Angliæ, &c. vicesimo primo, et Scotiæ, quinquagesimo septimo*) (2),” there is the following account of the same report :

28 May, 1624. “ Mr. Glanvill reports from the Committee of privileges : [382]

“ Concerning Pomfret.—Question, of Sir John Jackson.—Committee resolved, all the inhabitants, householders, ought to have voice. 2. Committee resolved, upon the latter writ no burgesses duly chosen ; but a new writ to go.

“ *Resolved, That the election ought to be, in Pomfret, by the inhabitants, householders, residents there **”

“ Resolved, That neither Sir Jo. Jackson, nor Sir Rich. Beomont, are duly elected ; and that a new writ shall go out, for a new election (3).”

(1) Journ. vol. i. p. 714, III. 3 T. Rep. 523, and *Rex. v. Clapp*, there cited.]

(2) *Ibid.* vol. i. p. 715.

[* For the difference between “ *inhabitants* ” and “ *inhabitants residents*,” vide *Rex. v. Tunstead*, R. H. 30 Geo. p. 798.

(3) (These two by the House, in consequence of the report of the Committee.) Journ. vol. i. p. 797, col. 2, p. 798.

The resolution of 1770, is as follows:

6 February, 1770. Resolved, "That the right
 " of election for members to serve in Parliament
 " for the borough of Pontefract, in the county of
 " York, is in persons having within the said bo-
 [383] " rough a freehold of burgage tenure, paying a
 " burgage rent (1)."

COUNSEL *for the Petitioners.*

If the resolution of 1624 was the *last determination* of the House in 1729, when the statute of George the Second passed (2), no subsequent act of the House can annul it: for that statute is binding on the House of Commons, and every last determination is to be considered as incorporated with, and making part of, the statute, as much as if it were there recited.

It cannot be said that it is only binding on returning officers. The act of the 7th and 8th of William the Third (3) had already made the last determination of the House conclusive as to them; and we can never suppose that the legislature inserted a new clause in a subsequent law for exactly the same purpose. The history of the fourth section of the statute of George the Second is to be
 [384] found in the debates of 173 $\frac{1}{2}$, when the standing order of that year was made. On that occasion it appears that there were some people who, thinking all restraint on the sovereign power of the House of

(1) Journ. vol. xxxii. p. 665,
 col. 2.

(2) Geo. II. cap. 24. § 4.

(3) Cap. 7. § 1.

Commons in election matters a great inconvenience, opposed the standing order, and endeavoured to explain the statute so as to make it nothing more than a re-enactment of the 7th and 8th of William the Third. Sir William Yonge was one of those. In answer to a speech of his on the subject, Sir Joseph Jekyl told the House, "That he was a member of Parliament when the act of George the Second passed; That this clause was not in it when it went up to the House of Lords, but was inserted as an amendment there; not indeed with any friendly view to the bill, but, on the contrary, in the hopes of its being thrown out on that account in the Lower House; those who proposed the amendment imagining that the Commons would not consent to such a restraint *upon themselves*; That, however, the majority of the House then thought it a reasonable and a necessary *restraint*, in order to prevent, in time to come, that frequent contradiction in their determinations with respect to elections, which had, in time past, greatly contributed to the giving people a contemptible opinion of all the proceedings of the House (1)."

[385]

The meaning and effect of the statute of George the Second being so evident, it remains only to show, that the resolution of 1624 was a determination of the right of election, and that there was no posterior determination in the House from

(1) Commons Deb. vol. ix. p. 96. 97.

that

that time, till 1729, when the statute took place.

[386] That resolution was a clear determination of the right of election. The account given of it by Glanville, the Chairman of the Committee who tried the cause, corresponds perfectly with the entries which have been read from the Journals (1). Both of these entries are, in substance, entirely consonant to each other, and they are both authentic; for the first was written by the clerk of the House, and the other by his son, who, on account of the father's indisposition was appointed to assist him in keeping the Journals, and was paid by the House (2).

The question of the right of election was directly before the Committee and the House; if that be necessary to bring the determination within the statute.—Sir Richard Beaumont pretended that the right was in the freeholders of the borough *only* (3). (B).

It was highly proper for the House to ascertain the right at the time, as, from the reign of Edward the First till 1621, there had been no election for this borough (4). (C).

The Committee, and the House, determined the right on the general principle of law, not to serve any particular purpose in this borough, which has

(1) P. 133.

(4) Glanv. p. 140. Journ.

(2) Journ. vol. i. p. 798, vol. i. p. 572.—26 March, col. 2.—29 May, 1624.

162½, p. 576.—27 March.

(3) Glanv. p. 142.

been too often the motive in other cases, where, notwithstanding, the decision is final, and not to be questioned. The general principle, "That, where
 " there is no charter or prescription to the contrary, all the inhabitants, householders, residents,
 " ought to have voices," had been recognized by the same Committee in the cases of Dover (1), and of Cirencester (2); and though there were controverted elections for Cirencester in 1690 (3), and in 1709 (4), the right of election as determined on the general principle in 1624, was never disputed or denied.

If the resolution in 1624 was a clear determination of the right of election, it will be easy to show, that from that time till the statute of George the Second took effect, there had been nothing done by the House of Commons to abrogate or overturn it.

[388]

In 1660, there was a treble return for Pontefract, but the right of election does not seem to have been in litigation; and the Committee (16th May) having reported *generally*, that Sir George Saville, Baronet, and William Lowther, Esq. had the greatest number of voices and ought to sit, the House came to a resolution that they were duly elected, and should sit; and ordered that the clerk

(1) Glanv. p. 63.

(3) Journ. vol. x. p. 461,

(2) Glanv. p. 107. Journ. col. 1.

vol. i. p. 708, col. 1. 21 May, 1624.

(4) Vol. xvi. p. 235, col. 1.

of the crown should take the other two returns off the file (1).

1695, 29th November, a petition was presented to the House, complaining of an undue election (2), on the part of Sir John Bland, which was referred to the Committee of privileges and elections, but on the 10th of February following it was withdrawn (3).

[389] $\frac{1699}{1700}$, 17th January, " Sir Rowland Gwyn, reported from the Committee of privileges and elections, on the petition (4) of Robert Moncton, Esq. complaining of an undue election, and return of John Bright, Esq. to serve for the borough of Pontefract, " That the right of election was *agreed* " to be in such persons as have an inheritance or " freehold of burgage tenure within the said bo- " rough (5)."

$\frac{1699}{1700}$, 14th February, a new petition was presented in favour of Mr. Moncton, and against Mr. Bright, who had been returned again on a new election, the former having been set aside in the House (6). Before this petition came to be tried

(1) Journ. vol. viii. p. 33, Dec. 1698. Journ. vol. xii. col. 1. p. 356, col. 1.

(2) Journ. vol. xi. p. 341, col. 2. (5) Journ. vol. xiii. p. 126, col. 2.

(3) Journ. same vol. p. 356, col. 1. (6) Journ. vol. xiii. p. 209. col. 1.

(4) First presented 16th

P O N T E F R A C T.

in the Committee of privileges and elections (1)
the Parliament was dissolved (2).

Lastly; 17 ^{$\frac{1}{2}$} , 22 March, Mr. Hampden reported from the Committee of privileges and elections, on the petitions of Sir William Lowther, Baronet, and Hugh Bethel, Esq. and of certain burgesses of Pontefract (3), “ That it was *agreed*,
“ That this was a borough by prescription; and
“ that the right of election is in persons having a
“ freehold of burgage tenure, paying a burgage
“ rent.” [390]

From this complete deduction of all the proceedings in the House, between 1624 and 1729, relating to elections for this borough, it is evident that during that interval, there was no resolution, no determination of the House on the right; nothing but *agreements* of parties; and neither the agreement of parties (4), nor even the resolution of a Committee, unless ratified by the House, can alter the law of elections.

The resolution of 1624, therefore, was the last determination in the House of Commons of the right of election for Pontefract, at the time when the statute of George the Second took place; and consequently became, by the operation of the statute, final to all intents and purposes; and [391]

(1) Journ. vol. xiii. p. 225, col. 2. p. 405, col. 2. p. 409, col. 1. 244, c. 1, 2. col. 2.

(2) 19 Dec. 1700, same vol. (4) Case of Cirencester, 21 May 1624, cited in the Case

(3) Journ. vol. xviii. p. 369, of Bristol, p. 270.

cannot be altered or annulled by any thing which the House either has done, or can do, subsequent to that statute (D).

COUNSEL for the Sitting Members.

The resolution of 1770 is conclusive,

Though the *last determination* is binding on the House of Commons, yet where a doubt arises whether there is a last determination, the House is the only court competent to try that question, and decide upon it; and, in 1770, the House did decide that what appears on the Journals of 1624 is not a last determination within the meaning of the act of George the Second; for they refused to let it be read as such, upon a division of 161 to 32.

[392] Would not a returning officer be bound to follow the resolution of 1770? It is the last determination, in point of time; and could he take upon him to question its validity, or to turn over the Journals, and fix upon something else as the last determination? If he could not, shall there be one last determination for returning officers, and another for this Committee?

It seems to be admitted, by the counsel on the other side, that if there was no determination before the year 1729, then the first after that epoch shall be the final determination within the meaning of the statute. This Committee has a power co-extensive with what the House of Commons formerly had; but it is not a court of appeal from former decisions of the House; and the court competent to the question having determined that
the

the right of election for Pontefract was not *finally* settled till 1770, the Committee cannot controvert the judgment.

If the Committee, however, should not think themselves precluded from going into the proceedings in 1624, a fair examination of the account given in the Journals of those proceedings, will demonstrate that what the counsel for the petitioners affect to treat as a last determination, cannot be considered as such.

[393]

One of them seems to admit, That there cannot be a determination within the meaning of the act of Parliament, unless where the right of election is litigated, and the parties are directly at issue upon it. This, indeed, must have been the reason which induced the legislature to use the word "*determination*," borrowed from Westminster-hall, instead of "*resolution*," the common technical word in the House of Commons. But it is evident, both from the Journals, and Glanville himself, that, in 1624, the right of election was not a necessary question in the cause. The true and only point was, whether the election should be void, the poll having been improperly stopt. If the Committee or the House decided upon any thing else, the decision was extrajudicial. It was a mere speculative opinion of the Committee, "That, in boroughs where there is no charter or prescription for choice, the right is in the inhabitants." The principles of the major part of those who composed that Committee are well known. They

were disposed to seize all opportunities of rendering every part of the constitution as popular as they could. But on the speculative doctrine, the best antiquarians and lawyers are of a contrary opinion. It appears from Dr. Brady, and other writers on the subject, that the right of election in all boroughs was anciently only in the tenants of burgage tenure. Lord Chief Justice Holt, in the case of *Ashby and White*, says, "That it is part of the constitution of England, that burgage tenure
" boroughs shall elect members to serve in Parlia-
" ment, and that, in that case, the right of elec-
" tion is a privilege annexed to the burgage land,
" and is a real privilege (1)." If it be said, that that opinion was delivered *obiter* by him, still it is of equal weight with a speculative tenet of serjeant Glanville, or of any other member of the Committee of 1624.

[395] The resolution, as stated in Glanville's Reports, is merely hypothetical. It proceeds on the supposition that there is no charter of incorporation to this borough of an earlier date than the 4th of Henry the Fourth. But there are charters of a much earlier date. One of the 5th of Richard the First, from Roger de Lasci, constable of Chester, and lord of the castle and borough of Pontefract, who thereby, among other privileges, "grants and
" *confirms* to his *burgesses* of Pomfret, and their
" heirs and successors, liberty and *free burgage*, and

(1) 6 Mod. 51, 52. Lord Raym. 951. Salk. 18. 20. 3.

" their

“ their tofts to be held of him and his heirs in fee,
 “ paying 12 *d.* for each whole toft, &c. as in the time
 “ of Henry de Lafci (1):” and this carries the con-
 ftitution of the borough beyond the time of legal
 memory. Another of the 6th of Edward the Firft
 from Henry de Lafci, earl of Lincoln confirms the
 former. Thefe charters prove the hypothesis of
 the Committee to have been falfe; and, if fo, the
 conclufion, although no other objection lay to it,
 muft fall to the ground.

All the returns fince 1624, fhew that the refolu- [396]
 tion of that year was never thought to be de-
 cifive of the right of election. There is one bear-
 ing date only three years afterwards, which is in the
 name of the *major, comburgenfes*, (now called alder-
 men) and *burgenfes*, without a word about *inha-*
bitants. From 1627 to 1699, except in one in-
 ftance, they all run in the fame manner. In that
 inftance, and in every inftance fince 1699, the
 word “ *comburgenfes* ” is left out, and the indentures
 of return purport (2) to be between the mayor and
 burgefles, but ftill not a word of *inhabitants*. It
 cannot be pretended that this was merely the cor-
 porate name, for the form is not “ Indenture be-
 “ tween the mayor, aldermen, and burgefles of
 “ Pontefract.” But “ Indenture between A.
 “ *major*, B, C, D, &c. *comburgenfes*, E, F, G, H, &c.
 “ *burgenfes*,” fo that thofe words are descriptive of

(1) This was given in evidence.

(2) The returns were produced and read.

C A S E X I.

the particular persons who voted at the different elections.

[397] The agreements in 1699 and 1715, if they did not decide the right, are, at least, strong evidence to show what the right was always understood to be, and that it was never thought that it had been decided in 1624.

But the bare inspection of the two entries of that transaction in the manuscript Journals is sufficient to satisfy the Committee, that in those loose and inaccurate minutes, taken by two different persons, and in many things varying materially from each other, there is nothing like that sort of determination which the legislature meant to speak of in the statute of George the Second,

About the year 1742, the project of printing the Journals was set on foot, and Mr. Hardinge, then Clerk of the House, a man of great learning and accuracy, was appointed to examine the originals, and report his observations to the House.— In his report, he says, “ The Journals of the reign
 “ of King James the First (being for the most part
 “ minutes taken by the clerk, and not afterwards
 [398] “ transcribed) are in many places incorrect and
 “ almost illegible, and are also much impaired by
 “ length of time and various accidents. Yet, as
 “ they contain the history of many important
 “ transactions, and also the heads of speeches delivered by many famous members in debates
 “ concerning the prerogative of the crown; and the
 “ liberty

“ liberty of the subject. &c. they seem worthy of
 “ very great regard.”

This report of Mr. Hardinge was subsequent to the statute of George the Second. Is it to be supposed, that if he had thought there was any thing in the Journals of James the First's reign, decisive of the rights of election, he would have overlooked, in his report to the House, a reason for preserving them much more weighty than that which he specified?

Glanville gives a fuller account of the proceeding in 1624 than either of the entries in the Journals, yet he does not say that the House adopted the opinion of the Committee concerning the right of election. On the contrary, after stating *that*, among several other propositions, as having been agreed upon by the Committee, he adds, “ In [399]
 “ conclusion, the Committee were of opinion, that
 “ a warrant ought to go forth for a new writ, the
 “ former election being void; *which* being so re-
 “ ported to the House, was there resolved and *or-*
 “ *dered* accordingly.” That is, it being reported that the Committee thought the election void, the House resolved it was so, and ordered a new writ to be made out. If the House had adopted the previous propositions, Glanville would have ushered in his account of them as he does in other cases, where the House adopted and confirmed the resolutions of the Committee, by saying “ It
 “ was conceived by the Committee, and so re-
 “ ported

“ported to the House, and there resolved (1).
“ (E).”

If this Committee were to set aside the determination of 1770, on a future occasion a subsequent Committee may still consider it as the rule of their judgment, and thus this borough become an endless scene of uncertainty and litigation.

[400] COUNSEL for the Petitioners, in reply.

It is neither admitted that the act of George the Second had a *prospective* effect, as has been alledged; nor that a resolution of the House on the right of election is not binding if the point was not directly the subject of controversy between the parties.

However, neither of those propositions, even if they were true, can affect the present question; for it has been proved that the right of election was litigated in 1624 (2), Glanville stating that it was pretended on the part of Sir Richard Beaumont that the freeholders *only* had voice in election, from which we must infer, that the other candidate contended for a more extensive right; and, if there was a determination then, all idea, of a prospective operation of the statute in the present case is at an end.

When the act of Parliament speaks of the *last determination* in the House of Commons, it means

(1) Glanv. Case of Blechingley, p. 33, and other cases *passim*.

(2) Glanv. p. 142.

the last *resolution determining the right of election*. All determinations in the House of Commons are called *resolutions*, as those of the court of Chancery are called *decrees*, and those of the courts of law, *judgments*. “*Determination*” is not a technical word in Westminster-hall, nor the name given to the decisions of any court in particular; it is a general popular word, expressive of judgment; decrees, resolutions, &c. according to the court which happens to be in the contemplation of the speaker who uses it.

One of the objections to the resolution of 1624 is, that there are two entries of it. As if double evidence of any thing ought to induce us not to give any credit to it. It is said the two entries vary. They do in expression, but are the same in substance, and both the persons who made them were equally the servants of, and authorized by, the House (1).

The argument drawn from Mr. Hardinge's report is a singular one. It is equally valid against any other determination of the right of election in the reign of James the First. Yet the House has, since the statute of George the Second, recognized such determinations made in the same year with that under consideration. Thus that of 9th April, 1624, concerning the right of election in Chippenham is, by a resolution of 28 January,

[402]

(1) *Supra*, p. 386.

174 $\frac{1}{2}$, called the last determination of the House (1).

The charters anterior to that of Henry the Fourth mentioned by Glanville do not contain any regulation touching the right of election; so that though they had been known to the Committee in 1624, their judgment would have been the same. Their hypothesis is still true—there was no *charter for choice*.

[403] It will be difficult for the counsel on the other side to impeach the credit due to the doctrines of Selden, Coke, Glanville, and the other members of the Committee of 1624, by calling those great men factious republicans, and they will not find it easy to gain equal credit to those of such a writer as Dr. Brady. As to what is said by Lord Holt, in the case of Ashby and White, the answer to it is, that it was clearly said extrajudicially, and, therefore, can only be considered as a hasty opinion not formed upon any mature consideration of the subject.—Whitelock adopts the general rule of the Committee of 1624. “The King,” says he, “may, “ by his charter, make any town a borough, and “ grant them the privilege of sending burgesses to “ Parliament, and the election of them to be by a “ special number of the inhabitants, as principal “ burgesses, aldermen, and the like; but where the

(1) *Vide supra*, Case of New p. 339.
Radnor, p. 330, and note (B.)

“ election is by prescription, it is generally *popular* (1).”

If the right of election was determined in 1624, no subsequent usage can affect or alter it. In the case of Preston, in 1768, the right of election having been determined, in 1661, in the following manner,

18 Dec. 1661, Resolved, “ That all the inhabitants of the said borough of Preston had voices in the election (2).”

[404]

The counsel for the sitting members proposed to bring evidence to show (by subsequent usage) that the words “ *all the inhabitants*” in the resolution of 1661, mean only “ Such in-burgessees of the last guild, or those admitted since by copy of court-roll, as are inhabitants of the place;” but the House resolved, 29 Nov. 1768, that such evidence should not be admitted (3).

But, as to the usage in Pontefract, it appears from Glanville, that, in 1624, none of the parties ever imagined that burgage tenure had any thing to do with the right of election. *Freeholders* in a borough (to whom one of the parties confined the right) are not necessarily *burgage tenants*. In Tavi-stock, and many other boroughs, where there are no burgage tenures, the right of voting is in the freeholders of the borough.

(1) Vol. i. p. 500. *Vide* (3) Journ. vol. xxxii. p. 79, Intro. note (C.) p. 69. col. 2.

(2) Journ. vol. viii. p. 336, col. 2.

The returns, which have been produced, do not prove the usage since 1624 to have been as contended for. "*Burgenfes*," in ancient instruments, does not mean only burgage tenants. Sir H. Spelman, in his Glossary, Title "*Burgarii & Burgenfes*," defines them to be, "*Burgorum villarumque clausarum habitatores*." Whitelock, in his Commentary on the parliamentary writ, says "*Burgeffes* " are the *inhabitants* and freemen of boroughs (1); and in another part of the same work he calls them, "*Inhabitants of towns or boroughs inclosed or fortified*(2)." The House of Commons themselves have interpreted the word to mean inhabitants, both in *charters* and *returns*.

[406] 23 May, 1660. " Mr. Turner reports from the Committee of elections, the case upon the double return, for the borough of Abingdon in the county of Berks; That, upon examination of the fact, the question appeared to be, " Whether the word "*burgenfes*" mentioned in the charter, extends to the *inhabitants* within the borough; and that the Committee were of opinion, they do extend to the said inhabitants;" and that, subtracting two of the electors, who were aliens, and four-and-fifty who received relief in the town, and are standing almsmen there, Sir John Stonehouse, Bart. who is returned by one indenture, had a greater number of voices than John Lenthall, Esq: who is returned by an-

(1) Vol. i. p. 500.

(2) Vol. ii. p. 95.

" other

“ other indenture: and that therefore the said
 “ Sir John Stonehouse is duly elected, and ought
 “ to sit.

“ Resolved, That this House do agree with
 “ the Committee, that the said Sir George (1)
 “ Stonehouse is duly elected, and do sit in this
 “ House (2)”

In this case of Abingdon, the House must have adopted the interpretation put, by the Committee, on the word “ *burgenses*” in the charter, as that is stated to have been the only question on which the validity of Sir John Stonehouse’s election [407] turned.

In the case of Aldborough in Yorkshire, in 1690, the main question was, “ Whether the right
 “ of election was in a *select* number of burgesses,
 “ holding by burgage tenure in the said borough,
 “ or in all the *inhabitants* there paying scot and
 “ lot.”

There were a great many returns produced on both sides, where the electors were described by the word “ *burgenses* ;” and though there was no parole evidence given to show the usage to be in favour of all the Inhabitants, the Committee and the House came to the following resolution:

17 May, 1690. Resolved, “ That *all the inha-*
 “ *bitants* of the said borough of Aldborough
 “ paying scot and lot, have a right to vote in

(1) Should be “ *John*.” col. 1. and 2.

(2) Journ. vol. viii. p. 42,

“ electing members of Parliament for the said borough (1)”

It is to be observed that there are burgage tenures in both those boroughs (Abingdon and Aldborough) as well as in Pontefract.

[408] If the Committee should decide on the present occasion as the House did in 1770, when, by one of the last acts of its judicial power, an additional and striking example was furnished of the impropriety of entrusting it any longer with that power, the decision will not bind any future Committee, nor annul the rights of the inhabitants; which, as they depend on an act of Parliament, and are secured by it, cannot be taken away by the determination of any particular cause like this, but will be still as valid as ever on a new election. It is easy therefore to see which of the two ways in which the Committee may determine the present cause, is most likely to beget future litigation.

On Friday, the 3d of March, the Committee, by their Chairman, informed the House that they had determined,

That the two sitting members were duly elected (2).

And, on the Monday following, Charles Mellish, Esq.

(1) Last determination. (2) Votes, p. 325.
Journ. vol. x. p. 418, col. 1, 2.

Esq. having been likewise chosen a burges for the borough of Boroughbridge, in the county of York, made his election to serve for the borough of Pontefract (1.)

(1) Votes, *loc. cit.*

[* For more concerning the right of election in Pontefract, *vide* case in 1785, 1 Lud. p. 3. and case in 1791, 1 Fras. p.

183 to 261. In which latter case the right was by virtue of 28 Geo. III. cap. 52. finally settled to be "in the inhabitants householders residents."]

N O T E S

ON THE CASE OF

P O N T E F R A C T .

Note
(A.)

PAGE 380. (A). The annexed plate is a *fac simile* of the first of the two entries.

Note
(B.)

P. 386. (B.) So we are told by Glanville's book. The whole of what is contained in the father's Journal concerning this election, is the short entry read to the Committee. In the son's, previous to the entry of the report from the Committee, stating the right of election, we find the following:

" 1 April, 1624. Sir Thomas Wentworth prefers a petition from Pomfret.—Read.—

" The mayor, before any writ came, undertook a place for
" Sir Jo. Jackson: shut the door against those, that came for
" Sir Richard Beomont: a number of recusants and papists
" brought in: 40 of them made burgeses, to carry the election.—The election being naught, the return cannot be
" good.—To have all reported to the House together.

" Sir George Moore.—This town admitted, the last Parliament, to send burgeses.—Since one side heard by counsel, to have the other heard.

" Mr.

“ Mr. Glandvill, upon question, to make the report.—
“ Considered one point, the validity of the return: Heard
“ no counsel on either side: Had the writ, and two inden-
“ tures. Sir H. Holcroft double-returned, he waved Pom-
“ fret. A new writ went down to Pomfret. The sheriff
“ makes this return: two days after the date of the writ,
“ mayor and aldermen told him, they had chosen Sir Jo.
“ Jackson: and after, the 11 of March, divers other alder-
“ men and burgeses told him, they had chosen Sir Richard
“ Beomont. He returned two indentures: 1. Mayor, al-
“ dermen, and burgeses;—The common-seal of the town:
“ 2. Four or five aldermen, and the rest burgeses, returned
“ Sir Richard Beomont.—20 and odd hands.—

“ Committee conceived, these several indentures to be re-
“ turned by the sheriff. They thought the form of it irre-
“ gular. Their opinion, that the return, as it is, hath sub-
“ stance sufficient to warrant Sir John Jackson to come into
“ the House. Afore they rose, a petition exhibited against
“ the election.—Writ good enough, although the * day;
“ because it begins not till the King come. Two returns,
“ He made a warrant to mayor, aldermen, and burgeses,
“ Sir Jo. Jackson's indenture is true then, according to
“ the warrant; other not.—Bear date one day.—Looked on
“ the hands to the indenture:—40 to one, but 20 to the
“ other. Sir Jo. Jackson the greater number. This the
“ ground of the opinion of the Committee.

“ Ordered, That this business of Pomfret, concerning the
“ election, shall be heard at the Committee of privileges, [412]
“ in his due time, and turn.

“ And left, by the House, to the choice of Sir John Jack-
“ son, whether to come into the House, or to forbear.”
Journ. vol. i. p. 751.

“ 28 May, Mr. Glanville reports, &c.

Note
(C.)

P. 386. (C.) 26 March, 1621. "Sir Edward Sands
" moveth for Pomfrett; which in Ed. I. time, and after, sent
" burgesſes: after, decayed by wars.—That the King grant-
" ed them a charter, 4 Jac. with reſtitution of all their li-
" berties and privileges, notwithstanding they be loſt, for-
" feited, &c. That they have ever ſi-thence—

" Committed alſo to the ſame Committee for privileges."
Journ. vol. i. p. 572. col. 2.

27 March. "Sir George Moore reporteth, from the
" Committee for privileges; That, for Pomfrett, that 26
" Edw. I. it ſent burgesſes; which continued a good while
" after. That, by reaſon of the baron's wars, it grew
" poor. That 10° & 11° H. VI. a return made, they could
" not ſend burgesſes, by reaſon of their poverty. That 4°
" Jac. the King granted them all their former liberties
" and cuſtoms, notwithstanding they had been forfeited, or
" loſt. That the Committee thinketh it to ſtand both with
" law and juſtice, that a writ ſhould go for choice of bur-
" geſſes.—

"Upon queſtion, Pomfrett to ſend burgesſes.

"Writ ordered." Journ. vol. i. p. 576. col. 1.

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By the above, it would ſeem that this borough had been
repreſented in parliament after the reign of Edward the Firſt.
But Glanville, who is probably more accurate though his
account is of leſs technical authority, ſays, that it diſcon-
tinued being a parliamentary borough from the time of king
Edward the Firſt, and he adds, "That *by reaſon of the long*
"*diſcontinuance of the borough*, there did not appear any
" known uſage or preſcription by whom the election ſhould
" be made." Glanv. p. 141.

Note
(D.)

P. 391. (D). From 1715 till 1768, there was no contro-
verted election for Pontefract, 10 Nov. 1768, two petitions
were preſented to the Houſe, complaining that at the laſt
election, when William Monckton Lord Galway, and Henry
Strachey,

Strachey, Esq. and Sir Rowland Winn, were candidates, the returning officer had been compelled by force to return Sir Rowland Winn, with lord Galway; and that a great majority of the legal voters would have presented themselves and voted for Mr. Strachey, if they had not been intimidated by the violence of several hundred rioters, armed with bludgeons, and other offensive weapons. Several of the rioters, (as one of the petitions set forth) had been convicted on an information tried at the assizes. When the matter of these petitions came to be tried (24th November) at the bar of the House. The House resolved, "That the counsel
"be confined to proceed only upon the allegations of the
"said petitions, which complain of the freedom of the said
"election being disturbed by riots." And after hearing counsel and examining witnesses the election was declared to be void. On this a new election took place, and Sir Rowland Winn, and his brother Edward Winn, Esq. being candidates, together with lord Galway, and Henry Strachey, Esq. the two last were returned, and the other two, together with certain inhabitants householders, in their interest, petitioned the House, Dec. 14, 1768, on the ground of the resolution of 1624. The hearing of these petitions was, by repeated adjournments, put off to the 6th of February 1770. On that day a doubt arising, how far the entries in the two Journals of the 28th of May 1624 were to be considered and read to the counsel as the last determination of the House within the meaning of the act of George II. counsel on both sides were heard to that point, after which, "A motion
"was made, and the question being put, that the two entries
"of the 28th day of May 1624 of resolutions concerning
"the right of election for the borough of Pontefract, appearing in two several Journals, be admitted to be read to the
"counsel at the bar, as the last determination of the House,
"touching the legality of votes for members to serve in
"Parliament for that borough; the House divided, and it

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Note
(D.)

[415]

"passed in the negative, 161 to 32." On this the counsel for the petitioners desired that leave might be given to withdraw their petitions, but this was objected to by the counsel on the other side, who desired to offer evidence to establish the right of election. The House resolved; That the petitions should not be withdrawn. The counsel for the petitioners declined giving the House further trouble. The counsel on the other side examined a witness to prove the right to be in the freeholders of burgage tenure; and produced several returns to shew that the elections were made by the mayor and burgessees. They then read the entries in the Journals of 17th Jan. $\frac{1}{17} \frac{692}{86}$, and of 24th of March 17 $\frac{1}{16}$, on which the House came to the resolution determining the right as stated *supra* p. 382. Journ. vol. xxxii. p. 665. col. 2.

P. 399. (E). There seems to be great weight in this observation. All that Glanville says of the propositions in question is, "Out of this case these points were agreed upon by the Committee." Yet in his account of another case he seems to consider that when the Committee agreed to, and reported, particular propositions and a general conclusion from them, the House, in making a determination agreeable to the conclusion, adopted the particular propositions. Case of Winchelsea, p. 17. he says, In this case, divers points "were moved, and debated in the Committee, and reported to the House with their opinions and reasons; all which, *under the general order and judgment of the House thereupon,* "were resolved and adjudged accordingly."

XII.

THE

C A S E

Of the BOROUGH of

A B I N G D O N,

In the County of BERKS.

The Committee was chosen on Friday, the 3d of March,
and consisted of the following Gentlemen :

Paule Fielde, Esq. Chairman - -	} Members for	Hertford.
James Scawen, Esq. - - - -		Surrey.
John Morgan, Esq. - - - -		Monmouthshire.
Hugh Owen, Esq. - - - -		Pembroke.
Edward Morant, Esq. - - - -		Lymington.
Charles Baldwyn, Esq. - - - -		Shropshire.
Gerrard William Vanneck, Esq. -		Dunwich.
Nathaniel Polhill, Esq. - - -		Southwark.
Thomas Halfey, Esq. - - - -		Hertfordshire.
Ambrose Goddard, Esq. - - -		Wiltshire.
James Whitshed, Esq. - - - -		Cirencester.
Sir William Guise, Bart. - - -		Gloucestershire.
Richard Aldworth Neville, Esq. -		Grampound.

NOMINEES

Of the Petitioner :

Hon. Thomas Francis Wenman -

Of the Sitting Member :

John Orde, Esq. - - - - -

Westbury.

Midhurst.

PETITIONER: ~~Mr.~~

Nathaniel Bayly, Esq.

Sitting Member :

John Mayor, Esq.

COUNSEL,

For the Petitioner :

Mr. Mansfield,

Mr. Lee.

For the Sitting Member :

Mr. Bearcroft,

Mr. Hardinge.

T H E
C A S E
Of the B O R O U G H of
A B I N G D O N.

ON Saturday, the 4th of March, the Committee being met, the petition of Nathaniel Bayly, Esq. was read, setting forth; That at the last election for the borough of Abingdon, in the county of Berks, the petitioner, and John Mayor, Esq. were candidates, Mr. Mayor being then high sheriff of the county of Berks; That at the place of election, and before the taking of the poll, the mayor of the borough, and the other electors, were publicly told, that Mr. Mayor, being high sheriff of the county, was incapable of being chosen for the borough, and that all votes given to him would be thrown away; That, however, the mayor himself voted, and also received the votes of divers other persons, for the high sheriff; and that the high sheriff

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sheriff had returned himself as duly elected, in manifest prejudice of the petitioner, who, being the only candidate capable of being elected, was duly chosen, and ought to have been returned: Praying, therefore, such relief as the House should think just and reasonable (1).

It was admitted that the facts were as stated in the petition, and that the majority of votes were in favour of the sitting member. The question of the high sheriff's eligibility had been argued by counsel, at the place of election, before the poll began; and, after their arguments, the returning officer told the electors, that in his opinion, Mr. Mayor, although high sheriff, was capable of being chosen.

There were two questions in this case.

1. Whether the high sheriff of a county may be chosen to serve in parliament for a borough within his county.

[421] 2. Whether, if he is not eligible, on such notice as was given in the present case, the votes for him are thrown away, and the other candidate, who had a smaller number of legal votes, duly elected: or, whether it is a void election.

COUNSEL for the Petitioner.

By an express clause in the writ of election (A), the choice of sheriff is prohibited. This clause has made part of the writ for above three centuries, and

(1) Votes, 6 Dec. 1774, p. 25.

if it were to be omitted, such omission would vitiate the whole; for original writs are of so high a nature, that they can be altered by nothing but an act of Parliament.

It is unnecessary to enquire how the prohibitory clause, or the "*nolumus*," (as it is called) was first introduced into the writ. Many think it is derived from the act of the 46th of Edward the Third, which Sir Edward Coke holds to be only an ordinance of the Lords, and no statute; while others do not adopt the distinction between ordinances and statutes, but consider both as having the force of acts of Parliament. It was thereby ordained, that no sheriffs, or men of the law, should be chosen. Accordingly, we find that, for some time afterwards, the prohibition in the writ extended to lawyers as well as sheriffs. Coke denies that there was any clause to that effect in the writs for the Parliament which was holden in the 6th year of Henry the Fourth, and which was called *parliamentum indoctum*, because no lawyers sat in it. He cites Walsingham, who says there was such a clause in those writs, to contradict him, and asserts, that the exclusion of lawyers was wrought merely by the king's letters, by pretext of the ordinance of the 46th Edward the third. But Prynne gives us the very words of the writs of the 6th of Henry the Fourth, "*Nolumus autem quod tu, seu aliquis alius vicecomes regni nostri, aut apprentius, aut aliquis alius homo ad legem, aliquammodo sit electus*;" and adds, "This appears by the exemplification thereof in
" the

[422]

“ the Claus. Roll. of 5 Hen. IV. *pars* 2. m. 4. *dorso*,
 “ in the Tower (which I have viewed with mine
 “ own eyes) by sundry transcripts thereof in manu-
 “ script; and by the testimony of Thomas Wal-
 [423] “ singham, who lived in, and wrote the history of,
 “ that time (1).” From that period, that part of
 the clause which excluded lawyers, has been dropt,
 but the other, against the election of sheriffs, has
 been continued ever since.

But sheriffs, previous to, and independent of,
 the ordinance or statute of the 46th of Edward the
 Third, were ineligible at common law, and, if so,
 it is of little consequence to the present question,
 whether *that* was, or was not an act of Parliament.
 It appears that in the 13th year of Edward the
 Third, the Commons prayed, “ That writs be sent,
 “ that the worthiest knights be chosen, and that
 “ lawyers *and sheriffs be left out* (2) (B);” and
 Prynne has preserved a return for Warwick of the
 28th of Edward the First, which proves, that the
 prayer of the Commons in the 13th of Edward the
 Third, with regard to sheriffs, was founded on their
 [424] ineligibility at common law. Indeed, the king had
 no power to create a new incapacity by inserting
 in the writ a prohibition not authorized either by a
 statute, or the common law. We must therefore
 understand the petition of the Commons to
 Edward the Third, as if they had said that sheriffs

(1) Prynne. *Plea for the* p. 357, from 13 Edw. III.
Lords, p. 380. *Rot. Parl.* n. 8.

(2) Whitel. *Comm.* vol. ii.

by law were ineligible, but had of late been returned to Parliament, and that it was therefore proper to correct this abuse, and assert their ineligibility in the writ of election. The case of the return for Warwick, in the 28th of Edward the First, was this. That prince had issued writs to the sheriffs of the different counties in England, "requiring them to cause to come to the Parliament to be held at Lincoln, those knights, citizens, and burghesses, who had sat in the former Parliament, and if any of them should be dead, or so ill as not to be able to attend, then to elect others in their place (1)" The return for Warwickshire is as follows.

"*Milites electi. S. S. Johannes Perceval de Samoy, &c. manuc. per &c.—Et idem Johannes fuit ad parliamentum prox. preteritum. S. S. Johannes de Clyntone de Makstoke electus est nunc loco Philippi de Payton, EO QUOD IDEM PHILIPPUS EST NUNC VICECOMES WARR. ET LEIC. Et predictus Johannes manuc. per,*" &c. (2).

[425]

The force of the prohibition in the writ has been much shaken in cases of sheriffs of one county who are returned as members for another. Sir Edward Coke, being sheriff of Buckinghamshire, was, in the second year of Charles the First, returned for Norfolk, and sat till the dissolution of that Parliament. But his right to sit was called in question, and both in the Journals, and in the de-

(1) Prynne's Brief Regist. p. 150.

p. 53, 54, & Brev. Parl. red. (2) Prynne, *loc. cit.* p. 55.

C A S E XII.

bates, and in the writings of his contemporaries, (as of Whitelock, who sat in the same Parliament,) (1), he is talked of as only a member *de facto* (2)

[426] There is no positive determination of the House that a sheriff can be legally chosen for *any* county.

Till the statute of the 23d of Henry the Sixth, (3) which enacts that precepts shall be sent to the different boroughs and cities entitled to send members to Parliament, the sheriff presided at the election of all the members within his county (C); and as it is not disputed that the prohibition is good against sheriffs returned as knights for their own counties, and this for strong reasons of convenience and policy, it must, for the same reasons, have had equal force, before that statute was made, against sheriffs returned for boroughs within their own counties. The opportunities of partiality and undue influence were, till then, the same in both cases.—If it was a legal and valid prohibition *at that time*, nothing but an act of Parliament can have annulled it since, and no such act exists.

There are *still* many reasons of expediency, in favour of the prohibition, even since the practice

[427] has been established of directing precepts, for election, to the mayors, or chief officers, of boroughs.

The sheriff has the discretionary power of either

(1) Whitel. Comm. vol. ii. col. 2.

P. 357.

(3) Cap. 14.

(2) Journ. vol. i. p. 869.

keeping the precept in his hands three days, or of issuing it on the day he receives the writ (1); and it is well known that the fate of an election may often be decided, in different cases, by retarding or accelerating the arrival of the precept in the borough.

When there are two contending returning officers, a sheriff, who is a candidate, may deliver the precept to the one who is in his own interest, and thus make sure of being returned, and obtain a seat in Parliament without having been duly chosen, and, perhaps, sit for a year or two before the merits of the election can be tried.

In case of a double return by two separate indentures, the sheriff may place that which is in his own favour nearest to the writ, by which means he will secure to himself the advantages meant to be given by the standing order of 1727⁷/₈ (2).

The wages, to which members of Parliament are entitled by law, are to be levied by the sheriffs, and if a man were at the same time sheriff and member for a borough within his county, he might be tempted in that part of his office, to act with partiality, and to secure the payment of his own wages, in prejudice of the other members for the county. [428]

Many learned constitutional writers have declared their opinion that sheriffs are not eligible, within their own counties.

(1) 7 & 8 Will. III. cap. 25.
§ 1.

(2) *Vide supra*, Case of Milborne Port, p. 100.

Sir Simon d'Ewes, observing on the case of Sir Andrew Noel, (who was chosen knight of the shire for the county of Rutland when he was sheriff of the county, and, after a debate on the subject, was, on that account, removed, 4 Nov. 1601,) says, "that the election of one who is first
 [429] "sheriff of some county, and then elected a knight
 "of the same, or a citizen, burghers, or baron of
 "any city, borough, or cinque port of the same,
 "is void." He observes, indeed, "that on the
 "21st of February, 158³/₇, Mr. St. Poole being
 "both knight for the county of Lincoln, and sheriff
 "of the same, was allowed his place in the House,
 "and had only licence given him to depart into
 "his county for the business of his sheriffwick;"
 but he reconciles this case to Sir Andrew Noel's,
 by supposing very reasonably, that St. Poole was
 not made sheriff till after his return to Parlia-
 ment, on which supposition there was nothing
 in his election contrary to the directions of the
 writ (1).

Mr. Hakewell of Lincoln's Inn, who was a great parliamentary lawyer, and long a member of the House, lays it down, in his *Modus tenendi Parliamenti*, "That no sheriffe shall be chosen for a
 "knight of the Parliament, nor for a burgesse
 " (2)."

Lord Chief Justice Hale recognizes the same doctrine (3); and Mr. Justice Blackstone says,

(1) D'Ewes's Journ. p. 624,
 625.

(2) P. 49.

(3) Hale of Parl. p. 114.

" Sheriffs

“ sheriffs of counties, and mayors and bailiffs of
 “ boroughs are not eligible in their respective
 “ jurisdictions (1).”

There are many cases in the Journals * where this doctrine is recognized, but in that of Stamford, in the year 1677, the very point now under the consideration of the Committee was determined. The case was briefly this:

Mr. Hatcher, high sheriff of Lincolnshire, at the election of a member for the borough of Stamford in that county, had the majority of voices; but the returning officer of the borough returned Henry Nowell, Esq. the other candidate, as duly elected; and this return was, by the sheriff *himself*, annexed to the writ, and forwarded to the clerk of the crown. Hatcher offered to present a petition, which produced a long debate on the subject of his eligibility for a borough in his own bailiwick (2), and was, upon the question, rejected (3).

If the sitting member was not eligible, the Committee must decide that the petitioner is duly elected. Where a disqualification depends upon a *fact*, which is not of public notoriety; as, for instance, the candidate's being under age, allowance is made for the ignorance of the electors who vote for the person so disqualified, and their suffrages are not considered as thrown away, unless they have

[431]

(1) Blackst. Comm. vol. i.
 p. 175.

(3) Journ. vol. ix. p. 407,
 col. 1.

(2) Grey's Deb. vol. iv. p.
 315.

formal notice of his disability at the time of the election. But the notoriety of the *law* is always presumed. Therefore, even if nothing had been said of the legal inability of Sheriffs to be chosen members of Parliament, at the time of the election, the votes given for the sitting member would nevertheless have been thrown away; for as to the *fact* of his being sheriff, that was, of course, known to all concerned in the election. However, the voters were, in truth, publicly informed both of the fact and the law; so that there cannot be the smallest pretence of surprize.

COUNSEL *for the Sitting Member.*

[432] The authority of mere *civil* writs is unquestionable. They are undoubtedly the best evidence of the law. But the same cannot be said of *political* writs. They rather testify, and particularly the writs of election, the tyranny of our Kings, and the arbitrary power they assumed, in former periods of the constitution.

If it were necessary to comply exactly with the letter of the writ, it might be made an objection to the election for a county, that the sheriff has not returned "two knights girt with swords (D);" and it was well observed by the returning officer, at this very election, that, by the words of the writ, he was commanded to return *two* burgessees, and yet no one would insist on a compliance with that injunction, since Abingdon has only a right of sending one (E).

The

The act of the 46th of Edward the Third is clearly not a statute; for in the roll it is distinguished from the statutes of that year. The words are, "The *petitions* which the Commons had presented in Parliament, and the *answers* to them" were read, and likewise an *ordinance*, &c. (1)." Now it is well known that, in those days, the statutes were in the form of *petitions and answers*, and they are evidently mentioned here as something different from this ordinance.

[433]

If this ordinance were to be considered as an act of Parliament, yet the evil which it complains of (and, therefore, that which it was intended to remedy) is only that sheriffs had been returned for *knights of the shire* (2). *Burgesses* of Parliament, therefore, were not then in contemplation, and the provision cannot be construed to extend to them: especially when it is considered that laws creating disabilities, and in derogation of general rights, are to be taken strictly.

As to the writs of the 28th of Edward the First, and the return for Warwickshire, the whole of that transaction seems to have been so contrary to law, the King dictating who the people were to choose for their representatives, that no solid argument can be built upon it. Besides, in that case, though Payne the sheriff was thought to be ineligible for his county, it does not follow that they would not have chosen him for a borough within his county.

[434]

The petition in the 13th of Edward the Third,

(1) Append. to Ruffhead's ed. of the Stat. p. 43.

(2) Ruffh. App. *loc. cit.*

only shows that lawyers and sheriffs were by the petitioners considered as improper persons to be returned to Parliament.—It does not appear to have been complied with.

The “*nolumus*” in the writ extends to all sheriffs. Yet it will not, at this day, be contended that the sheriff of one county is not eligible for a borough in another. In the beginning of the last Parliament, Mr. Child, being Sheriff of Warwickshire, was chosen and returned for Wells, in the county of Somerset. He was petitioned against, and the merits of his election tried before the Committee of privileges and elections, and they and the House, determined, 9 March, 1768, That he was duly elected (1). (F).

[435] In like manner, if the prohibition of the writ were adhered to, a sheriff of one county could not be chosen knight of the shire for another. The counsel for the petitioner admit that its authority in that respect has been much shaken. Sir Simon d’Ewes says, “Although a man may be first made
“ a sheriff of some county, and be afterwards
“ elected a knight, citizen, burghers, or baron of,
“ and in, some other shire or county, it should
“ seem his election standeth good (2).”

The question of Sir Edward Coke’s eligibility was moved on the 10th of February, 162 $\frac{5}{8}$, in consequence of a message from the King (G), and it was ordered to be *first* heard by the Committee of

(1) Journ. vol. xxxii. p. 299, col. 2.

(2) D’Ewes’ Journ. p. 625.

privileges (1); yet it appears that he had privilege of Parliament allowed him on the 9th of June following (2), which shows that, notwithstanding the King's impatience to have him removed from the House, it was not in his power to obtain a decision against his eligibility.

If sheriffs are eligible for any other county but their own, why should they not be so for boroughs in their own county? It has been shown that the election of sheriffs to be *knights* was the supposed evil which the ordinance of Edward the Third (on which the "*nolumus*" in the writ is clearly founded) was intended to remedy. Is the prohibition to have no force in the cases which it was particularly aimed at, and to operate in those which it was not intended to affect?

[436]

Since the statute of the 23d of Henry the Sixth, the sheriff is in no respect the returning officer for boroughs. He is obliged to accept the return sent him with his precept, and is merely the conduit-pipe to convey it to the clerk of the crown. If, therefore, we were to suppose that the prohibition of the writ was valid before that statute, because of the supposed partiality of the sheriff if he could have returned himself, and because (as Mr. Serjeant Croke quaintly expresses himself in Hatcher's case), a man cannot be *agent* and *patient* at the same time, yet, since the statute those reasons no longer exist, and *cessante causa, cessat effectus*.

(1) Journ. vol. j. p. 817, col. 2. Littleton's Rep. col. 2.
Long's Case, p 340.

(2) Journ, vol. i. p. 869,

* The sheriff does not sign the indenture for a borough which is sent to the clerk of the crown, but only the counterpart left in the country, which is nothing more than a memorandum or certificate; for when a return is to be amended, the amendment is made on the indenture sent to the clerk of the crown. It is never thought necessary to alter the counterpart in the country. Formerly the returning officer of the borough, not the sheriff, used to be sent for, to amend his own return; or, in some instances, it was sent down to him to be altered in the country (1).

It is not even necessary to the validity of a return that it should pass through the hands of the sheriff. This appears from the case of *Leskeard*, in *Townshend's Collections* (2). "The burgessees of that borough being elected, the town refused to deliver up their indenture to the sheriff; but the party elected made his indenture, and delivered it to the clerk of the crown, who filed it with the rest of the indentures returned by the sheriff, having indorsed it upon his writ; but the indenture was never executed by the sheriff; nor returned; and yet this indenture was held by the Committee to be good."

It is said that, in levying the wages of the members for his county, a sheriff might be partial to himself. Such an argument will not have much

(1) *Vide supra*, Introduction, note (W.) p. 92.

(2) Page 63.

weight. Suppose a sheriff should give himself the preference, may not executors do the same? There is nothing illegal in it, since the law, in the case of executors, countenances such a preference.

There is not much greater weight in the argument drawn from the power which the sheriff has of issuing his precept either on the first or last of the three days, after he receives the writ; for there is always intelligence, and substantial notice of an election, before the precept arrives.

But a general answer to all the arguments drawn from the supposed partiality and misconduct of sheriffs, is, that the law will not *presume* fraud and misconduct in its officers. [439]

Observe what might be the consequence, if it were to be holden that sheriffs cannot be chosen members of Parliament. The Crown would then be able to prevent any one from being elected, by taking care to make him a sheriff before the election. On a general election, in bad times, every friend to the rights of the people might, by this means, be excluded from the House of Commons.

The passage cited from Sir Simon d'Ewes is merely a *dictum* of his, and his manner of reconciling the case of St. Poole with Noel's case, nothing but conjecture.

Mr. Justice Blackstone says, "That sheriffs, mayors, and bailiffs, are not eligible in their *respective* jurisdictions, being *returning officers*." It has been shown that sheriffs cannot be considered

as the returning officers for boroughs; and the meaning of this passage is, that a mayor or bailiff cannot be chosen *within his jurisdiction as returning officer*; that is, * he cannot be chosen for his borough, and that a sheriff cannot be chosen *within his jurisdiction as returning officer*; that is, he cannot be chosen for his own county.

In Willis's Noti. Parliam. we find that Barnard Granville, sheriff of Cornwall, was member for Bodmin in that county; and it is no objection to the authority of that precedent, that there is no account of any complaint or petition against him; for the House, if he had not been eligible, would themselves have taken notice of it, and would have amoved him (H), as they would a peer if he were to be elected and returned.

[441] In the year 1727, Charles Bathurst, Esq. was returned for the borough of Richmond in Yorkshire, and a petition was presented against him, and that very petition mentioned that he was at the time of the election, high sheriff of the county; yet, on the trial of the cause no objection was made to him on that account, and, though it was determined against him, (14th March, 1727) it was decided on quite different grounds (1);

The counsel on the other side have only produced one case in favour of the doctrine they have to support; and in the debate on that very case,

(1) Journ. vol. xx. p. 25, 26, 72. col. 2. 78. col. 1, 2. 86. col. 1.

that

that of Sir Walter Long is cited, who was member for Bath, and Sheriff of the county at the same time; and Mr. Oakley said, in the same debate, that he was member for Bishop's Castle, in the Convention Parliament, when he was sheriff of Shropshire, and sat without controversy (1).

Hatcher's case was not like the present. For he had returned *another*, and, therefore, the House thought that he was, by his own act, estopped from complaining of the return. That his petition was rejected on this ground (however unreasonable, since he was *obliged* to accept the return made by the presiding officer of the borough) is evident from the following entry in the Journals.

27 March, 1677. " A motion being made
 " that the petition of Mr. Hatcher, high sheriff [442]
 " of the county of Lincolne, exhibited to the Com-
 " mittee of privileges and elections, setting forth,
 " that he is duly elected for the town of Stamford
 " in the said county, [*be rejected* (2);] *he having*
 " *himself returned Henry Nowell, Esq. as duly elected*
 " *for the said town*; Resolved, That the petition of
 " Mr. Hatcher, high sheriff of the county of
 " Lincolne, exhibited to the Committee of privi-
 " leges and elections, touching the election for the

(1) Grey's Deb. vol. iv. the motion, but evidently
 316. ought to be there to complete

(2) Those words [*be re-* the sense, and make it corre-
jected] are not in the entry of spond with the resolution.

“ town of Stamford within the said county, be re-
 “ jected (1).”

But, at most, this is only one precedent, and it happened at so unsettled and factious a time, that its authority cannot be great; surely not sufficient to establish a disqualification which would affect so many, and might be attended with such ill consequences. If a single precedent were sufficient for
 [443] such a purpose, the Attorney General could not sit in Parliament, for the Journals will furnish an instance where the House decided that he was not eligible, and, when he had been returned, declared his election void (2). 9 and 10 Feb. 162 $\frac{5}{6}$ (I.)

If the Committee should be of opinion that the sitting member was not eligible, yet it cannot be contended that those who voted for him threw away their votes, as they acted in consequence of the decision of the magistrate who presided at the election, and who, after hearing counsel, declared to the electors that the sitting member was not disqualified. In the debate in Hatcher's case, whose authority is trusted to so much, Mr. Powle said, and, as to *that*, was not contradicted, “ that, “ though the sheriff be incapable of serving, it shall “ not make the *minor* part capable to elect (3).” At all events, therefore, the petitioner cannot

(1) Journ. vol. ix. p. 407. (3) Grey's Deb. *loc. cit.*
 col. 1.

(2) Journ. vol. i. p. 456,
 col. 1, 2, 460. col. 2.

succeed

succeed in being declared duly elected. If the sitting member * was not eligible, the election was void.

COUNSEL *for the Petitioner, in reply.*

The maxim, that fraud is not to be presumed, is true, with regard to *particular* cases, but in construing the law upon a *general* question, (such as the present) that construction is to be preferred which leaves the least room for fraud, and best serves to prevent it.

The entry of the order for allowing Sir Edward Coke privileges of Parliament is in the following words: 9 June, 1626. “ Upon question, Sir Edward Coke, standing *de facto* returned a member of this House, to have privilege against a suit in Chancery commenced against him by the lady Cleare.” This proves that he was not then considered as a legal member of the House.

The case of Granville has only been cited from Willis, a very modern author, and it does not appear that he was not appointed sheriff after his election.

The Richmond case was decided on the merits of the election, and it was, therefore, unnecessary for the parties, or the House, to go into the question of Mr. Bathurst's eligibility. [445]

Sir Walter Long's case is misrepresented by Mr. Powle, in the debate on the case of Stamford; for it appears, from Lyttleton's Reports, that he was sheriff of *Wiltshire*, and member for Bath in the
county

county of Somerset; and Covert, whose case was cited by the counsel on one side in that of Long to show that a sheriff is eligible in his county, was proved to have been sheriff of *Suffex*, and member for Petersfield in *Hampshire* (1).

In whatever manner the entry in the Journals of the proceeding in Hatcher's case may be worded, it is evident from the debate on that occasion, that the chief question in the House was the eligibility of a sheriff within his county. That case, therefore, is a precedent in point; and as no instances can be given of sheriffs sitting in Parliament for any borough within their county (K), when their [446] election was controverted, the law must be now considered as established, and unalterable but by act of Parliament.

As to the power the King will have, if sheriffs are thought to be ineligible within their counties, of excluding from the House persons obnoxious to the court, there is little reason to be alarmed with fears on that score; for a man who is inclined to oppose the crown, will have fully as good an opportunity of doing so as sheriff, as he would have as member of Parliament; seeing that, as sheriff, he has of course a very great influence in his county, and great authority in all elections there; so that, if he cannot himself be returned to Parliament, he may promote the election of others equally hostile to the court.

(1) Lyttleton's Rep. p. 329.

If the fitting member, being sheriff of the county, was *ineligible*, it is a clear consequence, (especially after the formal notice was given before the poll began) that the votes in his favour were thrown away, and that the petitioner was duly elected. This principle, in all the debates on the Middlesex election, was never questioned on either side.

On Monday, the 6th of March, the Committee, [447] by their Chairman, informed the House, that they had determined (L),

That neither the fitting member, nor the petitioner, were duly elected; and that the election was void (1)*.

(1) Votes, p. 330.

[* *Vide infra*, vol.]

N O T E S

ON THE CASE OF

A B I N G D O N.

Note
(A.)

PAGE 421 (A). THE WRIT to the sheriff of Oxfordshire, (transcribed from the original in the office of the clerk of the crown.)

“ George the Third, by the grace of God, of Great Britain, France, and Ireland, King, defender of the faith, and
 “ so forth; to the sheriff of the County of Oxford greeting.
 “ Whereas, by the advice and assent of our council, for
 “ certain arduous and urgent affairs concerning us, the state,
 “ and defence of our kingdom of Great Britain, and the
 “ church, we have ordered a certain Parliament to be holden
 “ at our city of Westminster, on the 29th day of November
 “ next ensuing, and there to treat and have conference with
 “ the prelates, great men, and peers of our realm, we com-
 “ mand and strictly enjoin you, that (proclamation being
 “ made of the day and place aforesaid in your next county
 “ court to be holden after the receipt of this our writ) two
 “ knights of the most fit and discreet of the said county,
 “ girt with swords, and of the university of Oxford two bur-
 “ gesses, and of every city of that county two citizens, and
 “ of every borough in the same county two burgeses, of the
 “ most sufficient and discreet, freely and indifferently by those
 “ who

[449]

“ who at such proclamation shall be present, according to
 “ the form of the statutes in that case made and provided,
 “ you cause to be elected; and the names of those knights,
 “ citizens, and burgeses so to be elected (whether they be
 “ present or absent) you cause to be inserted in certain in-
 “ dentures, to be thereupon made between you and those
 “ who shall be present at such election; and them at the day
 “ and place aforesaid you cause to come, in such manner
 “ that the said knights for themselves and the commonalty
 “ of the same county, and the said citizens and burgeses for
 “ themselves and the commonalty of the said university,
 “ cities, and boroughs respectively, may have from them full
 “ and sufficient power to do and consent to those things
 “ which then and there, by the common council of our said
 “ kingdom, (by the blessing of God) shall happen to be or-
 “ dained upon the aforesaid affairs, so that for want of such
 “ power, or through an improvident election of the said
 “ knights, citizens or burgeses, the aforesaid affairs may in
 “ no wise remain unfinished; *willing nevertheless, that*
 “ *neither you nor any other sheriff of this our said kingdom be*
 “ *in any wise elected*, and that the election in your full county
 “ so made distinctly and openly, under your seal, and the
 “ seals of those who shall be present at such election, you do
 “ certify to us in our Chancery, at the day and place afore-
 “ said without delay, remitting to us one part of the afore-
 “ said indentures annexed to these presents, together with this
 “ writ. Witness ourself at Westminster, the first day of
 “ October, in the fourteenth year of our reign.”

[450]

The writs to sheriffs are all in the same form, except that in this, and in *that* to the sheriff of Cambridgeshire, there is a clause for the election of members for the respective universities. I have inserted one of *them* on that account, because in the case of Wigtown an argument is drawn from the word *burgess*, as applied to the members for the universities.

Note
(A.)

✍ The writ to the sheriff on a general election is not printed in the appendix to the common book on the law of elections.

Note
(B.)

P. 423. (B). This petition of the House of Commons in the 13th of Edward III. affords a presumption that the prohibition of the 46th of the same King was ordained in consequence of a petition of theirs; and if so, it was, according to the forms of those days, an act of Parliament.

Note
(C.)

[451]

P. 426. (C). Before the statute of the 23d of Henry VI. it was the "usual custom in *sundry* counties of the realm to elect their knights, citizens, and burgeses, on the same day; in their county court, by the suiters or others resorting to it, or by four or five citizens or burgeses only, (whereof the mayor, bailiff, or chief officer was usually one) sent from every city or borough to the county court to elect their citizens or burgeses, so soon as the knights were chosen, and to return both the knights, citizens, and burgeses names, in, or by, one indenture alone, or the knights in one indenture by themselves, and all the citizens and burgeses thus elected in and by one indenture distinct from the knights, under the seals of the citizens and burgeses electing them." See Prynn's Brev. Parliam. red. p. 252, where this is proved by a great variety of returns in the reigns of Henry V. and Henry VI. "Some boroughs used to *elect* four, or a small number of burgeses, who went to the county court, and, for the whole body, elected the burgeses." *Id. ibid.* p. 256. This was something analogous to the present mode of electing delegates to choose the members for the royal boroughs in Scotland.

"The form of electing citizens and burgeses at the county court, was not universally observed in all counties; but the sheriff of many shires sent either the writs themselves, or precepts grounded thereon, to the mayors and

" bailiffs

“bailiffs, to elect and return citizens and burgeses, which
“they accordingly did, and returned by special indentures
“long before the statutes of 7 Henry IV. and 23 Henry
“VI.” *Id. ibid.* p. 261. This he proves likewise by a
great number of instances; one of them as far back as the
reign of Edward the Second.

Note
(C.)

P. 432. (D). By the statute of 23 Henry VI. cap. 14.
§ 3. “It is enacted, that the knights hereafter to be chosen
“shall be notable knights of the same counties for which
“they shall be chosen, or *otherwise, such notable esquires,*
“*gentlemen of birth, of the same counties, as shall be able to*
“*be knights.*” So that the necessity of being a knight, in
order to be eligible for a county has been dispensed with by
act of Parliament, and yet the direction to chuse knights
girt with swords is still retained in the writ. Long before
the statute just mentioned, there are instances of returns of
persons who were not knights, for counties. Prynne has
printed one, by the sheriff of Northumberland, 34 Edw. III.
which sets forth, that, there being only one knight in the
county, and he “*languidus et impotens ad laborandum,*” two
others who were not knights, had been returned, (Brev.
Parl. red. p. 167) and another of the same sort by the
sheriff of Rutlandshire, in the 4th of Edward the Second.
Id. ibid. p. 170.

Note
(D.)
[452]

P. 432. (E). Abingdon was made a parliamentary
borough, with power to send one burges to Parliament, in
the 2d and 3d of Philip and Mary.

Note
(E.)

P. 431. (F.) The petition of Peter Taylor, Esq. and
certain electors of Wells, complaining of an undue election
and return of Clement Tudway, Esq. and Robert Child,
Esq. was presented to the House, and referred to the
Committee of privileges and elections, 15th Nov. 1768.

Note
(F.)

Note
(F.)

Journ. vol. xxxii. p. 36. col. 1. 2. On the 9th of March following, the Committee reported, "That they were of opinion that both Mr. Tudway and Mr. Child were * duly elected, to which the House agreed." Same vol. p. 239. col. 2. Mr. Child was sheriff of Warwickshire at the time of his election, but that was not objected to him in the petition.

Note
(G.)

P. 435. (G). 10 Feb. 1625, "Mr. Chancellor of the Exchequer delivered a message from his Majesty; That, taking notice of an order here, to send out writs, upon double returns, taketh also knowledge, that Sir Edward Coke, being sheriff of Buckingham, and being returned one of the knights for the shire for Norfolk, contrary to the tenure of the writ, hopeth this House will do him that right, as to send out a new writ.—Mr. Chancellor of the Dutchy moveth, to refer this to the Committee of privileges; and report to the House their opinions of the law, and usage.—Resolved.—And to be *first* heard." Journ. vol. i. p. 817. col. 2.

Note
(H.)

P. 440. (H). There is such an instance in the case of the Attorney General. *Vide infra*, note (I).

Note
(I.)

P. 443. (I). 8th April 1764, "Mr. Duncombe:—To have the privileges examined first, and openly; particularly, whether Mr. Attorney General may be chosen in respect no precedent, that an Attorney General chosen.—Writ of attendance.—Sir H. Hobart's case ruled, because then a member of this House, when chosen Attorney. Mr. Alford moveth, that the House may determine, whether Mr. Attorney may serve." Journ. vol. i. p. 456. This motion produced a long debate, and the matter was referred to a Committee to search for precedents. 11 April, That Committee reported, That Sir Henry Hobart was

was the only Attorney General who appeared, in the clerk's hand, to have been in the House; that he was of the House when he was made Attorney, and, by connivency, continued to serve.—After a new debate, the question was put, “Whether [Mr. Attorney] shall for this Parliament remain of the House, or not:—Resolved, He shall. 2. “Whether any Attorney General shall, after this Parliament, serve as a member of this House:—Resolved, No.” Journ. vol. i. p. 456. col. 1. 2. 460. col. 2.

9 Feb. 162½, “Mr. Speaker moveth, that Mr. Attorney returned from Greenestead, and mentioned the order. “12^o Jac.”

“The order to be brought, and read, to-morrow morning; and then order to be taken for it in the House.” Journ. vol. i. p. 817. col. 1.

“10 Feb. A new writ, for choice of another burgess for the borough of East Grinstead, in the room of Sir Ro. Heath, his Majesty's Attorney General, according to the precedent of 12 Jacobi.” Journ. same vol. *loc. cit.* It appears, by the Journals, that, soon after the Restoration, the Attorney General sat in the House, and that his eligibility has never been objected to since.

[455]

P. 445. (K). There are instances of sheriffs returned for boroughs within their own counties, and allowed to sit, although objected to at their election, and petitioned against.

Note
(K.)

5 Decem. 1710. A petition was presented complaining of an undue election and return for Derby, setting forth, That, at the election, the petitioners openly, in public court, objected against Mr. Harpur, one of the sitting members, as incapable of being elected, for that he was then high sheriff of Derbyshire. This, and a general charge of bribery against him and the other sitting member, was all the complaint of the petition. Journ. vol. xvi. p. 419.

Note
(K.)

col. 1. It was withdrawn, by the leave of the House, on the 19th of Feb. following. Journ. same vol. p. 507. col. 1.

Note
(L.)

P. 447. (L). The case of Sir George Selby, who in the reign of James the First, being sheriff of Durham, was returned for the county of Northumberland, was not, as far as I recollect, cited by the counsel, in this case of Abingdon, but I have great reason to think that it weighed very much with the Committee.

" 9 April 1614. Mr. Francis Moore reporteth the proceedings of the Committee for privileges, yesterday.

" For the petition of Northumberland,

" The petition four things:

" 1. Setting back the clock, and then refusing to take voices after nine:

" 2. *That Sir George Selby not eligible; for that no sheriff, by the writ, to be chosen; where Sir George sheriff of Durham Bishoprick.*

" 3. For want of freehold.

" 4. For want of residence in that shire.

[456]

" That Sir George present, alledged, that the bishop had discharged him before the election.

" The Committees—

" The sheriff's—still executed by him—

" For the undue election; thought fit, the sheriff should be sent for, by the greatest number of Committee.

" The other two points not thought fit to be examined, for that, the electors' fault, not the sheriff's."

(Here some other matter intervenes.)

" Mr. Fuller—Sir George Selby to be discharged, and a new writ for a new choice; and the sheriff to be sent for.

" Sir Edw. Sands:—1. Whether a sheriff may be re-turned.

" 2. Whether a sheriff of Durham.—

“ A sheriff not to return himself.—

“ The words of the writ not ancient, to restrain the
“ election of sheriffs—Not ancient, therefore not the com-
“ mon law, nor by statute law: *Ergo*, this no sufficient
“ warrant.

“ For Durham; the sheriff not made by the King, but
“ the bishop; and for life, not for a year.

(Here some other matter intervenes.)

“ Sir Roger Owen:—That the writs anciently such as
now, to restrain electing or returning of sheriffs, for in the
Register, and *Nat. Brevium* (1).—

“ For Durham sheriff, the like for them as for the sheriff
“ of Chester and Cornewale, &c.—

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“ The reason why restrained; for that he hath *custodiam*
“ *comitatus*; and commandeth all duties, &c. and is to exe-
“ cute all processes.”—

(Here again some other matter intervenes.)

“ Sir Henry Montague:—That no sheriff can by the law
“ be chosen: The writ in the negative.

“ Resolved, upon the question, that Sir George Selby,
“ sheriff of Durham, cannot be chosen knight of the shire for
“ Northumberland: and ordered, that a warrant be made, by
“ Mr. Speaker, to the clerk of the crown, for the election of
“ another knight for that shire in his place.” Journ. vol. i.
p. 457. col. 2. 458. col. 1.

(1) The writ is in neither of those books.

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XIII.

THE

C A S E

Of the TOWN of

S H R E W S B U R Y,

In the County of SALOP.

The Committee was chosen on Tuesday, the 7th of March,
and consisted of the following Gentlemen:

John Orde, Esq. Chairman, - -	} Members for	Midhurst.
John Elwes, Esq. - - - - -		Berkshire.
Richard Aldworth Neville, Esq. -		Grampound.
Sir Cecil Wray, Bart. - - -		East-Retford.
Charles Brett, Esq. - - - - -		Lestwithiel.
John Cooper, Esq. - - - - -		Downton.
William Ewer, Esq. - - - - -		Dorchester.
William Chafin Grove, Esq. - -		Weymouth, &c.
Edwin Lascelles, Esq. - - - -		Yorkshire.
Daniel Lascelles, Esq. - - - -		Northallerton.
John Darker, Esq. - - - - -		Leicester.
George Bridges Brudenell, Esq. -		Rutlandshire.
Lucy Knightley, Esq. - - - - -		Northamptonshire
N O M I N E E S,		
<i>Of the Petitioners :</i>		
Right Hon. Thomas Townshend		Whitchurch,
		Hants,
<i>Of the Sitting Member :</i>		
Henry Herbert, Esq. - - - - -		Wilton.

P E T I T I O N E R S :

Certain Burgesses, and others, Electors of the Town of
Shrewsbury,

Sitting Member :

Charlton Leighton, Esq.

C O U N S E L

For the Petitioners :

Mr. Mansfield, Mr. Kenyon.

For the Sitting Member :

Mr. Bearcroft, Mr. Davenport.

T H E
C A S E

Of the T O W N of

S H R E W S B U R Y.

ON Tuesday, the 6th of December, 1774, a petition of William Pulteney, Esq. was presented to the House, setting forth ; That, at the last election of members, to serve in Parliament for the town of Shrewsbury, Robert Lord Clive, in the kingdom of Ireland, Charlton Leighton, Esq. and the petitioner, were candidates; and that the mayor, by admitting votes for Lord Clive and Mr. Leighton, which ought to have been rejected, and rejecting others for the petitioner which ought to have been received, had stated a majority on the poll in favour of Lord Clive, and Mr. Leighton, and had returned them, although the petitioner would have had a very great majority, if justice [462] had been done to him (1).

(1) Votes, p. 25, 26.

On

On Friday, the 16th of the same month, a petition was presented, of certain burgesſes and others, entitled to vote for members of Parliament for the town of Shrewſbury, containing ſimilar allegations with the former, but only againſt the election and return of Mr. Leighton (1).

Both theſe petitions were appointed to be taken into conſideration on the ſame day.

In the mean time Lord Clive's death happened (2), but a new writ could not iſſue, while a petition was depending which queſtioned the legality of his election; becauſe, if it ſhould turn out on the trial that he was not duly elected, and that both Mr. Pulteney and Mr. Leighton were, then his death had not occaſioned a vacancy.

[463] On Monday, the 20th of February, 1775, the day for taking the two petitions into conſideration was altered from the 24th of that month, which was the day firſt appointed, to the 7th of March (3).

On Monday, the 6th of March, Mr. Pulteney had leave to withdraw his petition (4); and on the 9th, a new writ was ordered for electing a burgeſs in the room of Lord Clive (5).

The only petition, therefore, for the conſideration of the Committee, when they met on Wednesday, the 8th of March, was that of the burgeſſes

(1) Votes, p. 85, 86.

(2) 22 Nov. 1774.

(3) Votes, p. 247.

(4) *Ibid.* p. 328.

(5) *Ibid.* p. 351.

and electors, and Mr. Leighton's was the only election complained of.

The last determination of the right of election in Shrewsbury is as follows.

9 April, 1723. Resolved, "That the right of
 " electio of burgesſes to ſerve in Parliament for
 " the borough of Shrewſbury, in the county of
 " Salop, is only in the burgesſes inhabiting in the
 " ſaid borough, or in the ſuburbs thereof, pay- [464]
 " ing ſcot and lot, and not receiving alms or
 " charity (1)."

On the poll the numbers ſtood,

For Lord Clive, - - - -	210
For Charlton Leighton, Eſq. -	178
For William Pulteney, Eſq. - -	171

If a claſs of men, who had tendered their ſuffrages, and had been rejected by the returning officer, were entitled by law to vote, it was admitted that Mr. Pulteney had a majority, and was duly elected.

The queſtion then, was, Whether the Committee ought to allow their votes.

For the petitioners, it was contended,

That the perſons, whoſe votes had been rejected, were entitled to their freedom in Shrewſbury, under two immemorial cuſtoms, *viz.*

1. That all perſons of the age of one-and-

(1) Journ. vol. xx. p. 194, col. 1.

[465] twenty, and who have served a seven years apprenticeship to one of the trades which form fourteen ancient companies by prescription or incorporation in this borough, have a right to demand and be admitted to their freedom, on paying five pounds, and the usual fees.

2. That all persons, born within the borough, are, at the age of one-and-twenty, entitled, in like manner, to demand and be admitted to their freedom, on payment of five pounds, and the usual fees.

The fact, that the rejected voters came under the description of one or the other of those two customs, was not disputed.

It was proved, that, more than a year before the election, they had tendered the fees to the persons whose province it is, by the law of the place, to admit freemen: that they had claimed to be admitted, and were refused.

It was likewise proved, that they had tendered their votes at the election.

But the two customs were called in question.

In 1771, one Baxter, claiming his freedom under those customs, had brought a *mandamus* in the court of King's Bench.

[466] On the trial of that cause, the corporation contended, that the two customs, which the plaintiff alleged to be immemorial, were only introduced by a bye-law of 1642, which bye-law was repealed in 1733.

The plaintiff maintained, that the bye-law was
only

only declaratory of the ancient custom, which could not, therefore, be affected by the repeal of such bye-law.

The jury found for the plaintiff.

Baxter, in consequence of the judgment in his favour, sued out a *peremptory mandamus*, and was admitted to his freedom.—But the corporation, after that decision, still refused to admit the other persons who claimed under the customs.

In the case of Baxter, they had moved for a new trial, which was refused; but, a second *mandamus* being obtained against them, they moved that this new cause might be tried at bar: this was granted by the court, and, on that occasion, the judge who tried the first, said he thought, that, on the trial, it had not been properly understood.

This second *mandamus* was depending, in the court of King's Bench, at the time of the election. [467] It was tried in Michaelmas term (1), and determined in like manner as the former; and there was no application for a new trial.

On this state of the facts, the counsel for the sitting member insisted; That the right of the controverted votes, and the existence of the customs, were still open to the discussion of the Committee; that the two *mandamuses* were only conclusive between the parties; and that, on the trial of new *mandamuses*, the two former verdicts, although they might have great weight as evidence,

(1) 19 Nov. 1774.

would

would not conclude the jury. They suggested, that, since the last trial, and after the four days had elapsed which the court allows for moving for a new trial, they had discovered fresh evidence, which if laid before the Committee, would overturn the customs.

[468] The counsel for the petitioners contended, on the contrary; That, under circumstances like those of the present case, two verdicts, free from all suspicion of collusion, (the two mayors, against whom both the verdicts had been found, having continued to be warm partizans of the sitting members at the election, (1), unimpeached, and not disapproved of by the judge, would be conclusive evidence *as to the customs*, even in a court of law, because the parties to be bound by them, on a new *mandamus*, would be the same, viz. the corporation of Shrewsbury; that, on two such verdicts, a court of equity would make a decree to establish a custom, and would not grant a third trial; but that, if this were otherwise, a Committee of the House of Commons would never suffer two solemn verdicts, and consequent judgments of the only court competent to such causes, to be called in question before them. They said that, even in the Middlesex case, nobody had ever attempted to impeach the verdict finding Mr. Wilkes guilty of the libel.

[469] The counsel for the sitting members cited several

(1) This was not denied.

cases.

cases where courts of law had granted new trials after two concordant verdicts, and others, where courts of equity had done the same. But they were all shown to be cases where the judge who tried the cause signified his disapprobation of the verdict; and, besides, it was said that a verdict *before judgment*, when once it is set aside, is considered as if it had never existed.

On the other side, the cases of the duke of Beaufort; and of Manchester Mills, were cited, among others. The latter came on in the duchy court before Lord Kinnoul*, assisted by Lord Mansfield, who said, on that occasion, that a verdict in the time of Charles the First (which was produced in the cause) was conclusive evidence of the custom.

After this point had been argued, and the counsel directed to withdraw, the Committee, after short deliberation,

Resolved, not to admit any evidence to impeach the two verdicts, but to consider them as conclusive evidence of the customs. [470]

The sitting member's counsel then endeavoured to prove,

That the rejected voters had not applied in the proper manner, and according to the established usage, to be admitted to their freedom;

[* *Quer.* if not Lord Edg- Dougl. Rep. of Cases in B. R. cumbe.] *Vide* Cort v. Birk- 218.
beck, B. R. H. 19 Geo. III.

But

But it came out from the evidence, that the mode of their application was regular.

They then contended,

That as the title of those men to their freedom was in suspense, and under litigation in Westminster hall, when their votes were rejected, they could not be of any avail as to *this* election; for that, in instances where the votes of men who had applied for their freedom and were refused, have been allowed, on proving their titles, the case had been always such as to satisfy the Committee, or the House, that there was no *just* ground for refusing them, and that it was done by concert with a candidate, and in order to affect the election.

[47¹] The Committee, however, on the same day (Wednesday, the 8th of March), informed the House, by their Chairman, That they had determined;

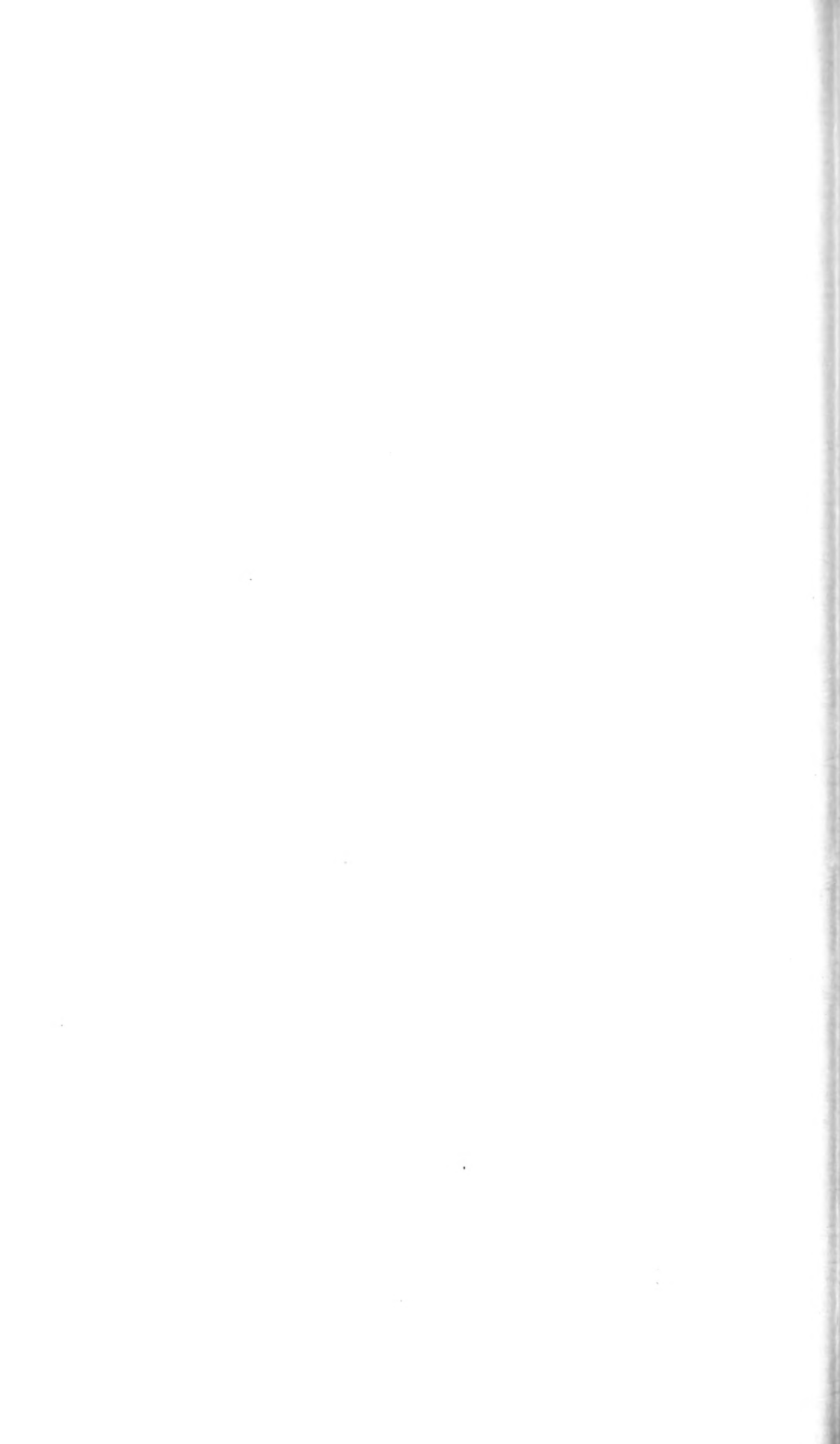
That William Pulteney, Esq. was duly elected, and ought to have been returned (1).

(1) Votes, p. 343.

END OF THE FIRST VOLUME.

*Printed by Luke Hansard,
Great Turnstile, Lincoln's-Inn Fields.*





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